Supreme Court, U.S.
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04-52 OCT 15 2004

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

John R. Wyss, et al.,
Petitioners,

v.

City of Hoquiam, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented:

The United States Court of Appeals for the Ninth Circuit has held that city legitimately exercised police power in disconnecting utilities and forcing Wyss from a home prior to a scheduled hearing, resulting in deprivation of Wyss's home by premature execution of its order. This raises three important federal questions that warrant review from this Court:

1. Whether United States Constitution requires cities to provide homeowner an opportunity for hearing prior to seizure of a home, except if acting properly under a warrant or a specific code or statute, or in a clear case of emergency?

2. Whether **"1997 Uniform Code for the Abatement of Dangerous Buildings"** limit city exercise of police power under that Code's **§403.1, §404, §501.1 and §504,** regarding due process in owner's appeal and hearing, when a timely appeal is filed, unless an emergency exists or immediate need is stated in "notice and order", and the alternate 10-day shortened appeal is granted to homeowner to expedite due process?

3. Whether decision below permits city to use standardless, arbitrary and selective or capricious methods to designate and to abate a home, and violates the Due Process Clause, the

Equal Protection Clause, and homeowner's United States Constitutional rights under and Amendments IV, V or XIV?

Parties to the Proceeding:

The following individuals and entities are parties in the court below:

John R. Wyss, as an individual and a homeowner; James Russell Beamer Wyss, a minor son of John R. Wyss, (Petitioners);

City of Hoquiam, a Municipal Corporation; the City of Hoquiam Department Of Public Works; Sue Vasey Mollett, as Hoquiam Building Official; Orlando Howell, as Hoquiam Code Enforcement Officer; John Does 1-10, employees or agents of the City of Hoquiam; Grays Harbor PUD, a Municipal Corporation; John Hoder, as employee or agent of Grays Harbor PUD; John Does 11 through 20, employees or agents of Grays Harbor PUD, (Respondents).

Table of Contents

Questions Presented..... Pg. i
Parties to the Proceeding.....Pg. ii
Table of Contents.....Pg.iii
Table Of Cited Authorities.....pg.iv
CONTENTS OF APPENDIX(UNDER SEPARATE COVER).....pg vi
Opinions Below.....Pg. 1
Jurisdiction.....Pg. 2
Constitutional Provisions and Statutes Involved..... Pg. 3
Statement of the Case..... Pg. 5
A. Factual Background
B. Proceedings in the Washington Courts
C. Proceedings In The District Court Western United States District Court No. CV-02-05529-JKA
D. Proceedings On Appeal Case No: 04-35020, Ninth Circuit Court of Appeals
Reasons For Granting the Writ .....**pg. 11**
I. Review Is Warranted Because The Questions Are Of High Public Importance In Order To Establish Due Process Rights Of Homeowners Under City Abatement Codes
II. Review Is Warranted Because The Dismissals Below Of Petitioner's 42 § 1983 Claims Conflict With Decisions Of This And Other Courts
III. Review Is Warranted Because No Court Has Analyzed The Unlawful Acts Of Officials In Light Of

City Code Pertaining To Any "Dangerous Buildings".

Conclusion.....**pg 27.**

TABLE OF AUTHORITIES

CASES

Branyon v. Kirk, 101 So. 345, 349, 238 Ala. 321. 20

City of Minot v. Freelander, 426 NW2d 556, ND 1988..... 19

Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990) 10, 15

Corbin v Hayes, 244 Ky 33, 50 SW2d 31..... 19

Diruzza v. County of Tahama, 206 F.3d 1304 (9thCir. 2000) 25

Flatford et al v. City of Monroe, et al, 794 F. Supp. 227; (1992)..... 11

Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Circuit 2001)(en banc), cert. Denied, 534 U.S. 817 (2001)..... 16

Fuentes v. Shevin, 407 U.S. 67 (1972) 3, 18

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 18

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)..... 26

Leppo v. Petaluma, 20 Cal. App. 3d 711 13

McMahon v. Telluride, 79 Colo 281, 244 P. 1017 12

Miles v. District of Columbia, 354 F. Supp. 577..... 13

Monroe v. Pape, 365 U.S. 167, (1961) 3, 27

Parratt v. Taylor, 451 U.S. 527 (1981) 17

Payton v. New York, 445 U.S. 573, 590 (1980)..... 3

Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991) 26

Roper v. Winner, 244 SW2d 355, Tex. Civ. App..... 19

Silverman v. United States, 365 U.S. 505.,..... 3

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).... 18

Soldal V. Cook County, 506 U.S. 56 (1992) 3, 11

Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989) 10, 14
Thornton v. Chase, 175 Misc 748, 23 NYS2d 735 19
Tribble v. Gardner, 860 F. 2d 321, 324 (9thCir. 2000) 26
United States v. Karo, 468 U.S. 705, 714 -715 (1984); 3
Wyss v City of Hoquiam, 147 Wash.2d 1025 (2002) 2

STATUTES

42 U.S.C.A. § 1983 ..... 4, 15, 27
Revised Code of Washington, RCW 36.70C.030 5

OTHER AUTHORITIES

McQuillin's The Law Of Municipal Corporations (3rd Ed) - § 24.560.-"Vacation" 18

REGULATIONS

1997 Uniform Code for the Abatement of Dangerous Buildings. §403.1, §404, §501.1 and §504 ..... passim

Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010.. ..... passim

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment IV 3
U.S. Constitution: Amendment V 3
U.S. Constitution Amendment XIV..... 4

CONTENTS OF APPENDIX
(UNDER SEPARATE COVER)
PROVIDED PER RULE 14.1(i):

1)Case No. CV-02-05529-JKA- United States District Court- (ORDER)

2)Case No: 04-35020, Ninth Circuit Court of Appeals- (Memorandum and Judgment)

3)Hoquiam City Code Chapter 2.22, Dangerous Buildings, section 2.22.010

4) 1997 Uniform Code for the Abatement of Dangerous Buildings; §403.1; §404; §501.1 and §504.

5) Revised Code of Washington, RCW 36.70C.030

6) McQuillin's The Law Of Municipal Corporations(3rd Ed)-§24.560.-"Vacation"

PETITION FOR A WRIT OF CERTIORARI

Petitioner John R. Wyss, owner of a home in the city of Hoquiam, Washington, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court Of Appeals For The Ninth Circuit in this case. In violation of the requirements of Hoquiam City Code, while awaiting a scheduled hearing by the city Board of Appeals as required, Hoquiam abused its police power by forcing petitioner from his home, not giving the opportunity to first be heard on a city matter alleging building code violations. By definition, the "Building Code" implies a collection of laws. The published statutes governing "Dangerous Buildings" are arranged in a systematic manner. Codes are to be taken literally as law. Enforcement of a non-emergency city agenda was standardless, arbitrary and selective, and on whim of a single official, not a Board of Appeals, as dictated by Building Code.

This Court's decision on a homeowner's right to an opportunity to be heard prior to loss of protected rights is of federal importance, as it relates to the rights of homeowners.

Opinions Below:

United States Court Of Appeals For The Ninth Circuit, Case No. 35020;

Western United States District Court Case No. CV-02-05529, The Honorable J. Kelly Arnold;

Other related opinion;

Court Of Appeals Of The State Of Washington, Wyss v City of Hoquiam, 147 Wash.2d 1025 (2002);

Jurisdiction:

The decision of the United States Court Of Appeals For The Ninth Circuit was entered on July 21, 2004. The decision below is final for the purposes of this court's jurisdiction under 28 U.S.C. § 1254, federal Court Of Appeals having rendered judgment. This Petition is filed within 90 days of that judgment. Based upon the fact that Hoquiam did not adhere to ordinance, thus due process standards of its Building Code, did not give appropriate rights to the homeowner.

Hoquiam's adopted code in the abatement of any so-called "dangerous buildings" is the "1997 Uniform Code for the Abatement of Dangerous Buildings.".

Petitioner recognizes that this Court will grant certiorari only in cases of compelling need. For the reasons above and discussed in more detail below, this Court's intervention is warranted in order to ensure that a homeowner's rights, and his equal protection the under law is respected. Jurisdictions

adopting codes must provide due process to property owners, and not skirt lawful procedure to advance selective agenda.

The vast number of property owners effected demonstrates that this case presents questions of similar seizure and due process factors in which the Court has granted certiorari before. See, e.g., Soldal V. Cook County, 506 U.S. 56 (1992); Fuentes v. Shevin, 407 U.S. 67 (1972) United States v. Karo, 468 U.S. 705, 714 -715 (1984); Payton v. New York, 445 U.S. 573, 590 (1980). Silverman v. United States, 365 U.S. 505., Monroe v. Pape, 365 U.S. 167, (1961).

Constitutional Provisions and Statutes Involved:

U.S. Constitution Amendment IV provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution: Amendment V provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment XIV provides: Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983 provides:
Every person who, under color of any statute, ordinance, regulations custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress.

Pursuant to this court's Rule 14.1 (f), the provisions of Hoquiam's Code and the adopted Uniform Code included in the Appendix per Rule 14.1(i) are:

1. Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010, (adopting 1997 Uniform Code for the Abatement of Dangerous Buildings);

2. 1997 Uniform Code for the Abatement of Dangerous Buildings.

3. Revised Code of Washington, RCW 36.70C.030(1)(L.U.P.A., or the Land Use Petition Act)

Statement of the Case:

A. **Factual Background**

In August 1999, Hoquiam Building Official Sue Vasey issued to petitioner "notice and order" to vacate and demolish petitioner's home, together with letters given by Ray Pumphrey, Fire Official, and Jim Tobey, Health Department, describing the presence of minor code violations, falling far shy of emergency, or immediate danger. Probative evidence to that is reflected in the letters of the officials, given at the time. Note that the contents of these two letters do not in any form describe emergency, or

immediate danger at the home of Appellant. (See letters regarding 314 Lincoln inspections of Ray Pumphrey and Jim Tobey, of July, 1999).

Building Code to abate any so-called "dangerous buildings" is **1997 Uniform Code for the Abatement of Dangerous Buildings.** The "Notice and Order", ostensibly issued under the authority of this code, provided for 30 days in which to appeal and contest the findings and order therein, which was to vacate the home within 30 days and demolish. No option to repair the building or abate any present violations was afforded the homeowner in this "notice and order".

Within the 30 days provided, on September 29, 1999 Wyss submitted his appeal, contesting each stated violation.

October 5, 1999 city posted "Do Not Enter" and October 22, 1999 city had Grays Harbor P.U.D. cut wiring to the building. October 22 city also notified Wyss that his "hearing" was to be November 10, 1999, but later rescheduled it to December 1, 1999, leaving Wyss without his home or access to his personal property under penalty of law.

1997 Uniform Code for the Abatement of Dangerous Buildings §403.1, §404 and §504 require the city to adhere to due process standards. City must provide homeowner a hearing by its "Board of Appeals" prior to enforcement of any "notice and order", if a timely appeal

has been filed, unless immediate need or emergency is stated in "notice", and the appeal period is shortened to 10 days.

Appellant appealed to the Building Code Council for a hearing, and contested the building official's order relating to code violations. City forced the homeowner out in October 1999, while he was awaiting a hearing on the matter, and then did not hear the matter until December 1999.

Hoquiam allowed and caused the property to further deteriorate from the elements after forcing Wyss from his home, contributing to its accusation of the home as "public nuisance". By vacating the home and disconnecting power in winter, other "expert declarations" made many months after disconnected power, vandals, vagrants, winter weather and forced vacancy of the homeowner took a significant toll upon the home. The home was not a "nuisance" at law or in fact, prior to Wyss being forced from his home without the assured prior hearing and opportunity to correct violations.

After the December 1, 1999 Building Code Council sent out a decision, Wyss, having been forced from his home, did not receive the final order until well after 30 days (the time allowed to submit to the final orders) and thus, no opportunity to correct the defects was provided to Wyss.

The provision of the Code to first provide hearing prior to "enforcement of

any order" is clearly designed to avoid breaches of due process such as this, and here, where the standards and provisions of the code are not followed by city, seizure and violations of due process provisions of a homeowner's United States Constitutional rights under Amendments IV, V or XIV occur, as they have here.

B. **Proceedings in the Washington Courts**

As to the State of Washington rulings, under RCW 36.70C or "L.U.P.A.", Wyss's request to have the city action reviewed by court was rejected due to a 21-day statute of limitations for the type of writ requested. Since city had forced Wyss from his home, the mailed order of the Board of Appeals did not reach him until well past the 21 days.

The mailing did not amount to a true opportunity to comply with the Board of Appeals: "process which is a mere gesture is not due process" Central Hanover Trust 339 U.S. 306. No findings on the merits were reached. From opinion in Wyss v City of Hoquiam, 147 Wash.2d 1025(2002):

> "Because Wyss's petition for review was properly dismissed as untimely, we do not reach the merits of whether the City's decision was proper. [FN7]: Although Wyss's appeal of the council's decision is untimely, his claim for damages is not because RCW 36.70C.030(1)(c) exempts claims for damages from

L.U.P.A.'s procedural requirements)" (infra, App.)

So, damages claimed are available.

C.Proceedings In The District Court Western United States District Court No. CV-02-05529-JKA

District Court issued "Order Granting Defendant's Summary Judgment" on November 21, 2003, dismissing all of Plaintiff/Petitioner's claims for damages against Defendants in an 11-page order. See Appendix.

Of particular note in that Order is Page 2, lines 21-28:

> "Plaintiff was forced out of the building when the City declared that the building was unsafe and dangerous".

It should be noted that facts show that Wyss was "forced out". That action occurred from October 5, 1999 to October 22, 1999, long before a hearing was provided Wyss December 1, 1999.

Also of note are facts provided in District Court Order at Page 6, lines 12-24, proving that the city invoked an adopted Code, the 1997 Code for the Abatement of Dangerous Buildings, and provided a 30 day appeal period. Section 501.1 provides that if immediate need may dictate immediate vacation, the appeal would receive an expedited due process hearing and, as such is to be filed within a 10-day window.

Such a need for immediate action was not required or disclosed by "notice and order", yet, Hoquiam enforced vacation of the building by disconnection of Wyss's utilities on October 22, 1999, well ahead of hearing provided December 1, 1999 (Page 9, line 26 to Page 10, line 11).

D. Proceedings On Appeal, Case No: 04-35020, Ninth Circuit Court of Appeals

Court issued "Memorandum" on July 21, 2004, affirming District Courts dismissal of Plaintiff/Petitioner's claims for damages against Defendants. This is a 4-page document, and appears in the Appendix, a-. A request for Rehearing was submitted late by Petitioner, and rejected. Judgment was filed and entered July 21, 2004.

Of note, and believed to be in error in "Memorandum" are particular case law citations. At Page 3, lines 4-11, a comparison of city's exercise of police power to that in the case of Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989) is drawn. At Page 3, lines 17-19, comparison to seizure of autos in Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990).

The Court of Appeals states that "Multiple expert declarations in the record clearly demonstrate Wyss's home was a nuisance..." (Page 3, lines 1-3).

The said declarations were provided long after deterioration as a result of the city's actions that elevated the

conditions present when Fire and Health officials Toby and Pumphrey wrote their initial reports in July 1999.

City claims that due to "public nuisance" a hearing did not need to be given prior to Wyss's deprivation.

Reasons For Granting the Writ:

I. Review Is Warranted Because The Questions Are Of High Public Importance In Order To Establish Due Process Rights Of Homeowners Under City Abatement Codes

Appellant John R. Wyss, appearing pro se, presents this petition as a homeowner of means that does not allow retention of counsel for this purpose. For the typical homeowner in America, a home represents not only a property interest, but an interest in one's life and liberty, as well, thereby invoking Constitutional protections. Flatford et al v. City of Monroe, et al, 794 F. Supp. 227; (1992); Soldal V. Cook County, 506 U.S. 56 (1992).

As this Court is aware, complex litigation against a city supported financially in its legal defense by a Cities Insurance Authority represents a serious threat to equal protection under the law for homeowners and their rights, as they exist under city statutes, when cities adopt Abatement Code of the type discussed herein, then do not adhere.

In all, 48 States and 9,000+ varied jurisdictions including Washington, D.C., Puerto Rico and the Department of Defense and the National Park Service have adopted or are in the process of adopting one or more of International Code Council's Codes, author and publisher of code adopted now by Hoquiam as code, the "1997 Uniform Code for the Abatement of Dangerous Buildings".

Homeowners within jurisdictions that adopt the "Uniform Codes" have defined rights to appeal a "notice and order" of a building official PRIOR TO THE LOSS OF A CONSTITUTIONALLY PROTECTED RIGHT, except in cases, if immediate need requires, where the Code provides for expedited 10-day appeal. (§501.1, §504)

Under the Code, an opportunity for owner's appeal to an order to vacate or demolish must be heard by a "Board of Appeals".(§403.1) As a Board, they need to rule upon any alleged code violations, make its order to the owner, allow the owner time certain under Code to comply, and if the owner does not comply with the Board, the building may be demolished without the need to compensate "taking".

City claims of an "abatable nuisance" are not true, and conflict with two letters, from the only "experts" to weigh in prior to deprivation of Wyss's property, and city should be held liable for damages. McMahon v. Telluride, 79 Colo 281, 244 P. 1017.

The unauthorized use of police power is a valid cause of action. Leppo v. Petaluma, 20 Cal. App. 3d 711.

Vacating the property at a time when appellant was waiting for a scheduled hearing on his September 1999 appeal caused a deprivation, by premature execution of its order without "due process of law", Miles v. District of Columbia, 354 F. Supp. 577 and under "color of law", in violation of 42 U.S.C.A. 1983.

As perceived by the "Memorandum", denigration to the property caused by torts of the city now help it in defending against indefensible acts.

How can a "reasonable" use of a city's police power, relating to building code violations, not need follow statutes, and its own code relating to building code violations, as in the present case, when emergency or immediate need is not present?

> "The City exercised its police power in ordering Wyss's home vacated and the electricity disconnected" (Memorandum, pg 3, line 4-5)

Municipal Code of Hoquiam itself forbids action, once appeal to a charge of nuisance based upon "code violations" is "properly and timely filed", unless an emergency is present, and the emergency is clearly stated and posted. (Chapter 5, Sec. 504) None was, because none existed.

The building official had no statutory grounds without support from its Appeals Council for "its police power in ordering Wyss's home vacated and the electricity disconnected", (Chapter 4, Sec. 403) so the acts were not justifiable exercises of police power, but were purely arbitrary.

II. Review Is Warranted Because The Dismissals Below Of Petitioner's 42 U.S.C.A. § 1983 Claims Conflict With Decisions Of This And Other Courts

There exists an apparent point of conflict with other decisions of the Court that were not addressed in the opinion.

Several material points of law are entirely overlooked in the decision, or are subjected to erroneous analysis.

For example, regarding case law citations contained in Memorandum filed July 21, 2004, please consider comparison to the case of Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989). Though similarity is drawn by the Court of Appeals here, it does not apply in Wyss v. Hoquiam, since as noted in its footnote n6:

> "n6 (excerpt) It is clear that once the decision to suspend the permit is made, *state law expressly provides for post-deprivation hearings.*"

> Cont……,"*The APCD's power to suspend permits immediately is necessitated by the state's interest in enforcing its pollution control laws. The California legislature has determined that swift administrative action may be necessary to protect the public health and safety from violations of the state's pollution control regulations.*" (italics added)

So, California statute provided for a post deprivation hearing in Soranno's., after a permit to pollute is suspended.

Just the opposite is true in Hoquiam, where the Building Code statute provides for an opportunity for hearing and ruling by its Board of Appeals prior to enforcement of any order. Therefore the case law does not support the finding of the Court of Appeals, but appears to support Wyss, since Hoquiam did not follow the regulations, as Morgan had in that California case of deprivation.

"Memorandum" at Page 3, lines 17-19, dismisses Wyss's seizure of "home and property" claim, and compares it to a seizure of autos in Conner v. City of Santa Anna, 897 F.2d 1487, 1493 (9th Cir. 1990).

That case law does not support the Court of Appeals finding because City of Santa Anna only removed automobiles from private property after "Santa Anna City

Council determined that the automobiles constituted a public nuisance". So, in Conner, a hearing of the Council was provided and determination then was made, then the Council order was enforced.

The Court of Appeals finding conflicts with the fact that Wyss did not receive a hearing until nearly two months after the trespass, damaging and taking of his home, with no legitimate reason for the deprivation. Hoquiam's arbitrary procedure violated Wyss's stated right to its Board of Appeals hearing, a determination and opportunity to comply before deprivation of protected rights.

Case law comparisons contained in District Court Order filed November 21, 2003, also fail.

Please consider comparison to the case of Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Circuit 2001)(en banc), cert. Denied, 534 U.S. 817 (2001).

At Page 5, lines 17-22, Judge Arnold points out that "a city may not arbitrarily enter abatement orders or declare the existence of nuisance with no underlying standards" at 652-653, yet points out at Page 5, line 28 to Page 6 line 4:

> Freeman v Dallas: "The court found that the City adhered to these standards and thus, the demolition of the apartment building did not violate the Fourth Amendment."

Since Hoquiam did not adhere to its codified and regulatory standards, the comparison is clearly defective.

From the landmark Parratt v. Taylor, 451 U.S. 527 (1981), in analyzing the need for and appropriateness of hearing before deprivation, where possible, Justice Blackmun, concurring, expands on the principle of "postdeprivation" remedies (which were found to be adequate in that case), and when they can apply in providing due process, and when they are inadequate:

> "Most importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies," ante, at 538, within a state system would cure the unconstitutional [451 U.S. 527, 546] nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," ante, at 541, it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. See Sniadach v.

Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks."

III. Review Is Warranted Because No Court Has Analyzed The Unlawful Acts Of Officials In Light Of City Code Pertaining To Any "Dangerous Buildings".

City actions are not merely the "unauthorized" acts of officials as suggested in District Court's Opinion. The official actions are illegal under City Code. This was not addressed.

Hoquiam City Code 2.22.010 "Dangerous Buildings" states:

> 2.22.010 Uniform Code Adopted.
> "The Uniform Code For the Abatement of Dangerous Buildings, 1997 Edition is incorporated by reference and adopted as the uniform code for the

repair, vacation, or demolition of dangerous buildings in the city."

Eugene McQuillin's The Law Of Municipal Corporations(3rdEd)-§ 24.560.-"Vacation", cites numerous examples respecting rights of homeowners faced with municipal exercise of police powers to abate what the city considers "nuisance". It has often been held that specific city officials that are properly empowered may act within the standards of a narrowly defined statute to the limit they may, and their acts must be lawful:

> From MCQUILLAN'S:
> "it has been ruled that while a city has authority to close up buildings that are a public nuisance, a notice and a hearing (Thornton v. Chase, 175 Misc 748, 23 NYS2d 735) and an opportunity to correct the defect must be afforded the owner.(City of Minot v. Freelander, 426 NW2d 556, ND 1988, & Roper v. Winner, 244 SW2d 355, Tex. Civ. App.)
> "Thus, a municipality cannot by ordinance declare a particular building a nuisance, eject the occupants summarily and take charge of a building and its contents. (Corbin v Hayes, 244 Ky 33, 50 SW2d 31)."

Factors present at the home, even if they were code violations, (the so-called

"nuisance likely to seriously injure occupants or visitors") were not "abatable nuisance" without giving consideration to due process and the provisions of the Building Code:

> "An "abatable nuisance" cannot arise from the doing, in a proper manner, of that which is authorized by law." Branyon v. Kirk, 101 So. 345, 349, 238 Ala. 321.

Wyss was properly waiting for his scheduled hearing under Building Code statutes when the deprivation of his home and property occurred. Wyss had been working to prepare the building for total renovation by removing old surfaces and debris from the old building. None of the work had required permits, and a plan for renovation was underway, and Wyss, like many homeowners, intended to fix the home himself and produce a refurbished product when the job was completed, all legal action on the part of the homeowner. No emergency or unusual factors other than a need for typical repairs existed at the home at the time city forced Wyss out in October 1999, while the appeal was scheduled for December 1999.

A brief review of 1997 Uniform Code for the Abatement of Dangerous Buildings shows that Wyss's rights were disregarded in total.

The Code provided the right to a hearing by the Board of Appeals on his timely filed appeal to the building

official's "notice and order", and the Code provided the right to an opportunity to make any needed repairs prior to forcing Wyss from his home.

The violations cited in building official's August 30, 1999 notice and order carried an offered 30 days within which to appeal. Hoquiam accepted the timely filed appeal September 29, 1999, a hearing date was set, THEN, ex parte, Hoquiam forced out Wyss and had P.U.D. cut the electrical wiring.

If Hoquiam permitted 30 days within which to file the appeal, then it becomes obvious that at the time "immediate action" was not needed. In fact the Building Code makes a special provision for emergencies allowing only 10 days to appeal, thus shortening the process, if a "postdeprivation" hearing is warranted. This was not the case at the time "notice and order" was issued. By offering the longer 30-day appeal time, Hoquiam's order did not declare or acknowledge an immediate need or emergency. No such immediate need existed or was ever been alleged, at the time of the deprivation:

> **Section 501.1 Form of Appeal(7):** "*..if the building is in such condition as to make it immediately dangerous* to the life, limb, property or safety of the public or adjacent property and is ordered vacated and posted in accordance with Section 404, ***such appeal shall***

be filed within 10 days from the date of service of the notice and order of the building official."

Section 404.2 Compliance:
"Whenever such notice is posted, the building official shall include a notification thereof in the notice and order issued under 401.2, *reciting the emergency* and specifying the conditions which necessitate the posting." *(italics added for emphasis)*

Section 502- Effect of Failure to Appeal:
"Failure to file an appeal in accordance with the provisions of Section 501 shall constitute a waiver of *the right to an administrative hearing and adjudication of the notice and order* or any portion thereof" (italics added).

After Wyss's deprivation of home and alienation of his property (not being allowed to re-enter his home), city officials, having caused greater damage to the property by cutting wires, shutting down all fans, heating and ventilation in October, allowed doors to be broken and property vandalized when vacant, then decided that it became expedient to declare that a huge safety hazard of some nebulous nature existed at

Wyss's home before, and thereby providing justification to those unlawful actions that were taken in forcing Wyss from his home without first the scheduled hearing.

An "abatable nuisance", in regards to its "Notice and Order" of August 30, 1999 could not exist without an Appeals Board ruling and an opportunity for the owner to comply therewith.

An "abatable nuisance" did not exist, and no emergency was present under circumstances that existed. This is supported by aforesaid two statements of July 1999 by Health Official Toby and Fire Official Pumphrey.

Wyss's deprivation did not follow an established procedure as specifically detailed in the Building Code.

City building official Vasey took the law into her own hands by writing a letter October 22, 1999 requesting that Grays Harbor P.U.D. cut wiring to the home while a scheduled hearing to Board of Appeals was pending. The willful acts violated Section 403, 1997 Uniform Code for Abatement of Dangerous Buildings:

> **Section 403- Repair, Vacation and Demolition**
>
> "The following standards shall be followed by the building official (***and by the Board of Appeals if an appeal is taken***) in ordering the repair, vacation or demolition of any dangerous building or structure:

"1. Any building declared a dangerous building under this code shall be made to comply with one of the following:

"A. The building shall be repaired in accordance with the current building code or other current code applicable to the type of substandard conditions requiring repair; or

"B. The building shall be demolished at the option of the building owner"

So, the city had adequate statutory safeguards in place to protect the public need for safety and nuisance abatement, but DID NOT FOLLOW STATUTES:

Section 504- Staying Of Order Under Appeal,

"Except for vacation orders made pursuant to Section 404, enforcement of any notice and order of the building official issued under this code shall be stayed during the pendency of an appeal therefrom which is properly and timely filed."

Under § 403.1, § 404 and § 504 1997 Uniform Code for Abatement of Dangerous Buildings, Hoquiam's adopted code, Building Official had no legal authority to engage in its premature enforcement actions, prior to the building owner's hearing upon his timely filed appeal of September 30, 1999 to the Hoquiam

Building Code Council (heard December 1, 1999, nearly two months after Wyss was forced from his home).

In *arguendo*, even if an overwhelming need for immediate action were needed, as shown by any real evidence available at the time, immediate or emergency actions along those lines are fully available under the code for "dangerous buildings", and were not taken. The petitioner was allowed to file an appeal within 30 days, not 10, as would have been required in the case of immediate need under **§501.1 Form of Appeal(7)**, and the required recitation of emergency under **§404.2 Compliance** is notably lacking from the building official's "notice and order".

It should be noted as circumstantial evidence, that in the prior 18 months of the petitioner's residency in the so-called "dangerous building" no accidents or injuries happened to any occupant or visitor, casting further doubt upon the legitimacy of any claim of "public need" to immediately abate.

From Diruzza v. County of Tahama, 206 F.3d 1304 (9thCir. 2000):

> "B. Qualified Immunity….Government officials who perform discretionary functions are entitled to qualified immunity only 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'

Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) This test necessitates a two part analysis: '(1) whether the law governing the official's conduct was clearly established, and (2) whether, given this clearly established standard, a reasonable official could believe that his or her conduct was lawful' Biggs v. Best, Best and Krieger, 189 F. 3d 989 (9thCir. 1999); see also Ortega v. O'Conner, 146 F. 3d 1149, 1154 (9thCir. 1998). A decision regarding qualified immunity is reviewed de novo. Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991). While the plaintiff bears the burden of proof regarding whether the right is clearly established, a defendant must prove his or her conduct was reasonable."

"For purposes of determining qualified immunity, the law must be clearly established at the time of the defendant's acts." And...

"requires more than an alleged violation of extremely abstract rights" Tribble v. Gardner, 860 F. 2d 321, 324 (9thCir. 2000) (citations omitted)" (From Diruzza v. County of Tahama)

As pointed out above, Chapters 4 & 5, Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition apply,

and staying of Wyss's deprivation was a matter of city code, which must be followed, if "qualified immunity" should apply under the circumstances.

The building official illegally enforced her own order while the statutorily assured hearing was pending, as evidenced by the city official's letter of October 22nd, 1999 to Grays Harbor P.U.D. calling for power disconnection

> Monroe v. Pape, 365 U.S. 167, (1961): "The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did"

Hoquiam's standardless, arbitrary and selective methods to designate and abate violated petitioner's rights without warrant, or authority of law.

Wyss's protected rights were ignored under 1997 Uniform Code for the Abatement of Dangerous Buildings. The City of Hoquiam and others are subject to all of Wyss's 42 U.S.C.A. § 1983 damages claims.

Conclusion:

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN R WYSS,
Petitioner/homeowner

DATE October 10, 2004

John R. Wyss
23005 107th Pl. W.
Edmonds, WA 98020
(206) 469-0777

(2)

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

John R. Wyss, et al.,
Petitioners,

v.

City of Hoquiam, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

APPENDIX INCLUDED UNDER RULE 14.1(i)

John R. Wyss
Petitioner
23005 107th Pl. W.
Edmonds, WA 98020
(206) 469-0777

APPENDIX INCLUDED UNDER RULE 14.1(i)
(Applicable portions only)

EXHIBIT #

1) Case No. CV-02-05529-JKA- United States District Court- (ORDER)..page 2

2) Case No: 04-35020, Ninth Circuit Court of Appeals- (Memorandum and Judgment)..... page 24

3) Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010..... page 29

4) 1997 Uniform Code for the Abatement of Dangerous Buildings. §403.1, §404, §501.1 and §504..... page 30

5) Revised Code of Washington, RCW 36.70C.030..... page 37

6) McQuillin's The Law Of Municipal Corporations (3rd Ed)- §24.560.-"Vacation" .....page 38

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CASE NO. C02-5529JKA
JOHNR.WYSS, Plaintiffs,
v.
CITY OF HOQUIAM, et aL, Defendants.

ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT
This case has been reassigned to the undersigned magistrate judge for the conduct of all proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) on the consent of the parties: The matter is before the court on plaintiffs motion for partial summary judgment (Doc~ 35),defendant City of Hoquiam's cross- motion for summary judgment (Doc. 38), and defendant Grays Harbor PUD's cross-motion for summary judgment (Doc. 51). The Court, after reviewing the pending motions, responses thereto, and the remaining record, does hereby find and ORDER:

1. Plaintiff, John R. Wyss, seeks partial summary judgment, including the court's declaration that the City of Hoquiam, Susan Vasey Orlando Howell, and the Grays harbor P.U.D. each violated his U.S. Constitutional rights. Plaintiffs

complaint names each of these individuals or entities as a defendant in the matter, in addition to naming the City of Hoquiam's Public Works Department, John Hoder, and John Does 1-20 as defendants. Plaintiffs complaint alleges the following three causes of action against these various defendants:

(i) deprivation of home and property without compensation;

(ii) denial of procedural due process~ and
(iii) physical invasion and the taking of plaintiffs property.

2. Defendant City of Hoquiam's cross-motion for summary judgment seeks dismissal of plaintiff's causes of action and judgment in its favor on certain counterclaims. Specifically, the City argues it has not unconstitutionally taken plaintiffs property and the abatement action was an exercise of necessary police power, which included adequate procedural due process. The City argues John Wyss's conveyance of a portion of the property to a minor child was an unlawful subdivision of the property and the court should nullify the conveyance. The City also argues the individual defendants, Susan Vasey and Orlando Howell, are entitled to

qualified immunity.

3. Defendant Grays Harbor PUD's motion for summary judgment seeks dismissal of plaintiff's causes action based on the argument that it had proper legal authority to disconnect electrical service without notice when a building is dangerous or unoccupied.

4. Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding whether to grant summary judgment, the court must view the record in the light most favorable to the nonmoving party and must indulge all inferences favorable to that party. Fed.R.Civ.P. 56(c) and (e). When a motion for summary judgment is made and supported as provided in Fed.R.Civ.P. 56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

The relevant facts are undisputed. Plaintiff, John Wyss, owns a 6,720 square foot, 8-unit apartment building, at 314 Lincoln Street in the City of Hoquiam, where he and his young son lived. On July 23, 199, Susan Vasey, Orlando Howell, Jim Tobey, Ray Pumphrey

and Pat Beatty inspected the building in the presence of Mr. Wyss. Plaintiff was forced to out of the building when the City declared that building was unsafe and dangerous.

The Washington State Court of Appeals concluded the following facts:

On August 30, 1999, the City issued a notice and order of abatement declaring Wyss's building to be a "dangerous building" in violation of the Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition, which the City had incorporated into its municipal code. Hoquiam City Code sec. 2.22.0 10. The City sent the abatement order to

ORDER
Page 2

Wyss at 9020 Greenwood Avenue North in Seattle, WA 98103.

The abatement order cited sections of the Uniform Code as adopted by the Hoquiam City Code that Wyss violated. The abatement order required Wyss to vacate the building within 30 days of the receipt of the order. It further ordered him to begin demolishing the building within 60 days of the order or the City would do so at Wyss's expense.

On September 29, 1999, Wyss appealed the abatement order by filing a notice of appeal with the Hoquiam Building Code Council. After some rescheduling, a hearing was set for December 1, 1999.

[FN1] The City sent a notice of this

hearing to Wyss at 9020 Greenwood Avenue North in Seattle. The notice was accepted and signed for at that address.

FNI. Originally, the hearing was set for November 10, 1999. Wyss appeared at that date, but the City's building official, Su Vasey, was unable to testify due to illness. The meeting was then rescheduled for December 1, 1999.

Wyss argues in his brief that the City violated its own rules when it held the hearing over 60 days beyond the date of the abatement order. See Uniform Code for the Abatement of Dangerous Buildings sec. 501.3, at appendix A-10 to Appellant's Brief Wyss did not raise this issue before the Council or the superior court and, thus, we do not consider this error here. RAP 2.5(a).

On December 1, 1999, the Council conducted a public hearing. It rendered a decision affirming the abatement order. Wyss appeared at the hearing, testified on his own behalf, and heard the Council's decision.

On December 8, 1999, the Council's chair signed the Council's findings of fact and determination of issues (the Council decision) regarding Wyss's building on 314 Lincoln Street. The Council's decision required Wyss either to bring the building into compliance with the Uniform Code and the Hoquiam City Code or to have the building

demolished.

On December 9, 1999, the City sent Wyss a letter containing the Council decision by certified mail to 9020 Greenwood Avenue North, Seattle, Washington, 98103. The certified mail envelope was marked 'refused' by postal employees and returned to the City. The City received the returned letter on January 14, 2000.

On February 9, 2000, Wyss sent the City a letter acknowledging receipt of the 'package of information' and requesting a permit to contract for his own demolition service.
The return address on this letter was 'John Wyss, 9020 Greenwood Ave. N., Seattle, WA 98103.' Clerk's Papers (CP) at 70.

On February 22, Wyss filed a petition for review of the administrative agency decision in Grays Harbor County Superior Court. The petition was filed under RCW 34.05.546, which sets forth the requirements for a petition for review under the
Administrative Procedures Act. Wyss noted in this document that 'messages can be left in care of attorney Marja Starczewski, at 2026 N.W. Market St., Seattle, WA 98107....' [FN2] CP at 25.

FN2. Wyss appeared pro se throughout all proceedings.

On February 28, the City filed a motion and affidavit for order of dismissal of Wyss's appeal as untimely.

The City argued that Wyss's petition was time barred.

On March 15, Wyss filed an "Amended Complaint, Verified Petition for Review

under RCW sec. 7.16.040 and Petition for Trial De Novo under RCW sec. 35.80.030(2)." [FN3} CP at 34.

FN3. RCW 7.16.040 authorizes writs of review when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

RCW 35.80.030(2) is the section of the Unfit Dwellings, Buildings, and Structures Act (Unfit Buildings Act) that allows a petition for an injunction and trial de novo within 30 days of the posting and service of a municipal order that is authorized under this Act. As will be discussed below, the Unfit Buildings Act is discretionary for municipalities. Thus, the City's regulations are not under authority of the Unfit Buildings Act.

In his amended complaint of March 15, Wyss declared that the Council mailed him its findings of fact and determination of

issues on January 21, 2000. He then stated that '{t}his Petition is filed within 30 days of the date of mailing of the {Council's decision.' CP at 35.

On March 20, 2000, the trial court heard argument on the City's motion to dismiss Wyss's appeal as untimely. The trial court concluded that the matter was a 'land use decision' as defined by the Land Use Petition Act (LUPA). RCW 36.70C.020(1)(c). Under LUPA, a petition for review must be filed within 21 days of the date the decision was issued, allowing three days for mail distribution. RCW 36.70C.040(4)(a). The court found that the December 9, 1999 mailing of the Council's decision was adequate service. It also found that even if the January 24, 2000 date was used as the service date (the date Wyss 15 acknowledges receiving the Council's decision), Wyss's petition was not filed within the 21-day limit. The trial court granted the City's motion to dismiss with prejudice. Wyss appeals. [FN4]

FN4. The City filed a motion on the merits to affirm. RAP 18.14. A commissioner granted the motion. Wyss filed a motion to modify the commissioners ruling, which was granted. RAP 17.7; RAP 18.14(i).

Wyss v. Cityof Hoquiam, No. 25907-9-TI, (Court of Appeals of Washington, Division 2, April 5,2002)(unpublished opinion). The State Court of Appeals further concluded that the City of Hoquiam

brought its abatement action under Hoquiam City Code sec. 2.22.0 10, and as a result, the City's decision was a "land use decision" subject to LUPA and LUPA's deadlines. Affirming the state trial court, the state court of appeals restated that LUPA required plaintiff to served all parties within 21 days of the land use decision, and the trial court's dismissal of Mr. Wyss's complaint as untimely was appropriate.

Following the State Court of Appeals' decision, on October 16, 2002, Mr. Wyss filed the instant complaint. In addition to the three causes of action alleged and noted above, the complaint states Mr.Wyss filed a petition for review with the Washington State Supreme Court. Complaint at 4, line13. The petition for review was denied on December 3, 2002. Wyss v. City of Hoquiam, 147 Wash.2d 1025

ORDER
Page 4

(2002).

6. Plaintiffs motion for partial summary judgment is DENIED, and Defendants (City of Hoquiam, Susan Vasey and Orlando Howell) motion for summary judgment is GRANTED.

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, Ker v. California, 374 U.S. 23, 30 (1963), declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purpose of this Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Procedural due process does not protect the actual deprivation of the life, liberty, or property in question, but ensures that individuals are given an adequate opportunity to challenge the government action. Carey v. Piphus, 435 U.S. 247, 259 (1978). To state a claim for a violation of procedural due process, plaintiffs must show (1) a protected property interest has been taken, and (2) procedural safeguards are inadequate. Board of Regents v. Roth 408 U.S. 564, 569-70 (1972).

Government regulation of "nuisance

properties" is at the heart of municipal police power. Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Cir. 2001) (en banc), cert. denied. 534 U.S. 817 (2001). As stated in that case, "It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values. Nevertheless, a city may not arbitrarily enter abatement orders or declare the existence of nuisance with no underlying standards." Id. at 652-653. "Public interest demands that all dangerous conditions be prevented or abated." Camara, 387 U.S. at 537. Whether or not a governmental action has violated a person's Fourth Amendment due process rights in a particular case requires the court to weigh the reasonableness of the seizure, a "careful balancing of governmental and private interests." Soldal v. Cook County, Ill., 506 U.S. 56, 71(1992).

In Freeman, the Fifih Circuit concluded that no Fourth Amendment violation occurred when the City of Dallas condemned and demolished an apartment building pursuant to its municipal code and without first obtaining a judicial warrant. The case turned on the fact that the City's ordinance and

procedures required reasonable notice to

and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court of the administrative decision. The court found that the City adhered to these standards and thus, the demolition of the apartment building did not violate the Fourth Amendment. In contrast, the U.S. District Court in Texas found a Fourth Amendment violation when the City of Dallas directed the demolition of several buildings and homes, and the City had failed to make reasonable efforts to provide notice to landowners. James v. City of Dallas, 2003 WL 22342799, (N.D. Texas Aug. 28, 2003, Cause No. C98-436R). These cases are instructive.

In the matter at hand the state court of appeals summarized the undisputed facts of the parties when it reviewed the state trial court's decision to dismiss Mr. Wyss petition to review the City's administrative decision. First, Mr. Wyss received notice that the City of Hoquiam had been monitoring and investigating the 8-unit apartment complex in a letter dated August 30, 1999, which was sent to his address of record, 902 Greenwood Avenue North, Seattle. In the letter, the City unequivocally stated that the building "is in a dangerous and dilapidated state," in violation of the Uniform Code for the Abatement of Dangerous Buildings. The City listed eleven specific code violations and stated, "Because of the serious safety

and health conditions that exist, as specified in subparagraphs (1) through (11), the structure known as 314 Lincoln Street, is declared a nuisance and contrary to the law," and that it must be demolished and vacated within the next thirty (30) days. The letter also provided Mr. Wyss notice that he could appeal the order of abatement to the City's Board of Appeals within thirty (30) days.

On September 29, 1999, Mr. Wyss delivered his written appeal to the Board of Appeals. Mr. Wyss's written appeal argues the building is not used commercially and that it has been converted to and is used only as a single family dwelling.

The Appeals Board hearing was originally scheduled for November 10, 1999, but due to Ms. Vasey's illness, it was rescheduled for December 1, 1999. Mr. Wyss attended the November 10, 1999, meeting and was informed that not testimony would be heard until December 1, 1999. In addition, a letter was sent to Mr. Wyss at the Greenwood Avenue address confirming the change in hearing dates.

On December 8, 1999, the Building Code Council and the Board of Appeals issued its findings and decision. The decision reflects that the August 30, 1999, Notice and Order of Abatement directed Mr.Wyss to vacate the premise and demolition of the building. The

decision further reflects that Mr. Wyss

testified at the December 1, 1999, hearing, and argued that he had accomplished and repaired many of the problems specified by the City's Building Department and the Fire Department. The Board considered a report prepared by Jim Tobey, of the Grays Harbor Health Department, dated July 28, 1999, and the testimony of Ms Vasey regarding the current condition of the building. The Appeals Board concluded among other things that the building was likely to partially or completely collapse, if lived in the building was likely to cause sickness or disease, it was a fire hazard, and its condition constituted a public nuisance.

The Board concluded by stating:

> The entire premises, both inside and outside the building, shall be cleaned-up and all garbage, refuse and debris removed to the satisfaction of the City Building Official. The building will then be demolished as set forth in the Notice and Order of August 30, 1999, unless the Appellant decides that he still wants to repair and rehabilitate the building, in which case he shall comply with the requirements set forth in Paragraph III, below.

III. Should the Appellant decide to repair and rehabilitate the building, he shall submit a satisfactory working plan or building plan to the City of Hoquiam Building Department and apply for a building permit, by not later than January 3, 2000. The Appellant shall then complete all necessary repairs to bring the building into compliance with the Uniform Building Code and the Uniform Code for the Abatement of Dangerous Buildings, on a schedule to be approved by the City of Hoquiam Building Department.

IV. In the event that the Appellant does not decide to repair and rehabilitate the building, or does not comply with the above requirements, he shall obtain a demolition permit and commence demolition of the building by no later than January 3, 2000. Should he fail to do so, the City of Hoquiam shall be authorized to take action to demolish the building in accordance with the Uniform Code for the Abatement of Dangerous Buildings.

The Washington State Court of Appeals found that Mr. Wyss was served with a copy of the Board's decision on December 12, 1999, when the City sent the decision by certified mail on December 9 to Mr. Wyss' Greenwood Avenue address. As explained by the State Court of Appeals, Mr. Wyss untimely filed a petition for judicial review of the Boards' decision on February 22, 2000.

This court is unwilling to disrupt the state court findings. As argued by defendants in their motion, Mr. Wyss is collaterally estopped from re-litigating the fact that the City sent a copy of the Board's decision to the appropriate address on December 9, 1999, and this was found sufficient. Moreover, the court questions whether it has any authority to consider Mr. Wyss's contention that he was not served with notice of the Board's decision until January 25, 2000 under the Rooker-Feldman Doctrine. As a general matter, lower federal courts do not have authority to review final determinations of state courts. Rather, the only federal forum in which such review can be sought is the United States Supreme Court. See Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir.1986) (citing 28 U.S.C. § 1257). The

Rooker-Feidman doctrine is merely a development of those principles: A federal district court does not 2 have jurisdiction to hear a case that would require the court to review a state court judgment, even if the case presents federal constitutional issues, and even if the state court judgment is not from the state's highest court. See Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221 (9th Cir.1994); WorldwideChurch

of God, 805 F.2d at 890, 893 (applying the doctrine to a case in which the appeal of the relevant state trial court judgment was still pending); see generally Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The doctrine encompasses cases in which the issues presented to the federal court are not identical to but are "inextricably intertwined" with determinations made by the state court. See Feldman, 460 U.S. at 483-84 n. 16, 103 S.Ct. 1303; Dubinka, 11 23 F.3d at 221-22. It also applies to prohibit federal judicial review of state court review of determinations made by state administrative bodies. Feldman, 460 U.S. at 468, 485-86, 103 S.Ct. 1303 (applying the doctrine to a decision of the District of Columbia Court of Appeals, upholding a decision of the Committee on Admissions of the District of Columbia Bar). Rooker-Feidman is jurisdictional. See Olson Farms, Inc.v. Barbosa, 134 F.3d 933, 937 (9th Cir.1998).

Nonetheless, after reviewing the governmental actions and the undisputed facts presented, the court finds that Mr. Wyss was afforded due process and the governmental actions taken were reasonable. Mr. Wyss makes a strong point that the initial Order of Abatement directed demolition of his home without

providing any alternative remedies, however, it is abundantly clear that Mr. Wyss was given the opportunity to appeal that Order, and as a result, Mr. Wyss was given the opportunity to make repairs to rehabilitate the building. It is also clear that Mr. Wyss was given the opportunity to petition the state court for judicial review of the Board's decision. It is problematic that Mr. Wyss did not file his state petition in a timely manner, but it does not defeat the fact that the opportunity was provided. In sum, plaintiff's Fourth Amendment due process rights have not been violated. No material question of fact exists relevant to this decision, and Defendants' motion for summary judgment is GRANTED.

With regard to plaintiff's Fifth Amendment cause of action based on the allegation that the City of Hoquiam defendants have seized and taken his property without just compensation, the court finds no merit in this claim.

ORDER

Page 8

The Fifth Amendment declares that "private property [shall not] be taken for public use, without 2 just compensation." U.S. Const. Amend. V; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S.155, 160 (1980). That prohibition applies to the States through the Fourteenth Amendment. Id. Here, as a matter of police power to protect and

ensure public safety, Mr. Wyss' building was declared a nuisance. The City did not take or seize the property for its own use. As described by the U.S. Supreme Court, when a landowner is prohibited from maintaining a nuisance he or she is not necessarily prohibited from making any lawful use of the property, and the Fifth Amendment is not a basis for a complaint. Mugler v. Kansas, 123 U.S. 623, 668-669 (1887). In this case, Mr. Wyss was not prohibited from using his building or the property on which is was located for any lawful purpose. Moreover, even if a cognizable taking had occurred in this case, Mr. Wyss has not pursued available and adequate post-deprivation remedies., and thus, he cannot maintain an action based on a "taking without just compensation." For instance, the unauthorized intentional deprivation of property by a state employee does not constitute a violation of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available under state law. Hudson v. Palmer, 468 U.S. 517 (1984).

The State of Washington provides a meaningful post-deprivation remedy for the intentional or negligent loss of property by state agents and employees. Jeffries v. Reed, 631 F. Supp. 1212, 1216 (E.D. Wash.1986). Here, Mr. Wyss has had the opportunity to challenge the City of Hoquiam's alleged taking in a reverse condemnation suit brought in state

courts. In sum, the court must GRANT defendants' motion to dismiss plaintiffs claims based on an alleged taking of property without just compensation.

7. Defendant Grays Harbor PUD's motion for summary judgment is GRANTED. Again, the relevant facts are uncontested. On or about October 22, 1999, PUD received a letter from the City of Hoquiam's Department of Public Works. The letter was written by Susan Vasey and states the following:

ORDER
Page 9

> Please by [sic] advised that the structure located at 314 Lincoln Avenue has been declared a nuisance and dangerous. Per the letter dated August 30. 1999, (enclosed), the City of Hoquiam has proceeded with the abatement of the structure. The building has been posted "DO NOT ENTER - UNSAFE TO OCCUPY".
>
> Because of the serious nature of the violations, we are respectfully requesting the P.U.D. remove the electrical power to the building.

As discussed in detail above, the August 30, 1999 letter (Notice and Order of Abatement) referred to was written by Ms. Vasey to John Wyss, which states the City "concluded and declare that the current condition of the eight-unit apartment building is in

a dangerous and dilapidated state, " and in violation Uniform Code for the Abatement of Dangerous Buildings.

Plaintiff argues he was entitled to notice from P .U .D. prior to having the electrical service to his apartment building disconnected. Plaintiff argues that P.U.D. actions without notice or procedural safeguards violated his federal statutory or constitutional rights. This court disagrees.

As discussed above, the City was exercising its police power. The P.U.D. reasonably relied on the City of Hoquiam's letter and Notice and Order of Abatement. Knowing that the premises were vacant and knowing that the City had declared the building unsafe and a fire risk, the P.U.D. did not violate plaintiff's due process rights when it disconnected the electrical power to the building.

8. Lastly, defendants ask the court to determine the legality of the transfer of property from Mr. Wyss to his minor son. Defendants specifically ask the court to declare the transfer void, to declare the transfer fraudulent, and to impose a fine on plaintiff pursuant to Hoquiam Municipal Code HMC 9.36.0 10.

As a matter of state property law, this court construes plaintiffs claims as a request for this court exercise supplemental jurisdiction. However, when the cause(s) of action on which federal jurisdiction is based are dismissed from

the case, it is within a district court's discretion to retain jurisdiction to adjudicate the pendent state claims. Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir.1991).
Further, it is generally preferable for a district court to remand remaining pendent claims to state court. Id.

ORDER
Page 10

at205.

As discussed above, plaintiffs federal claims have been dismissed. Accordingly, this court declines to exercise supplemental jurisdiction over those remaining state law matters raised by defendants.

9. Accordingly, plaintiffs motion for partial summary judgment is DENIED, and defendants' motions for summary judgment are GRANTED. Plaintiff's claims and causes of action are dismissed and the clerk is directed to enter judgment in favor of defendants.

DATED this Friday, November 21, 2003.
(signed)
J. Kelley Arnold
United States Magistrate Judge
ORDER
Page 11

Exhibit 2

FILED
NOT FOR PUBLICATION JUL 21, 2004
CATHY CATTERSON, CLERK
UNITED STATES COURT OF APPEALS
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT No. 04-35020 D.C. No, CV-02-05529-JKA
MEMORANDUM
JOHN R. WYSS, individually and as guardian Ad Litem of James Russell Beamer Wyss, Plaintiff - Appellant,
And JAMES RUSSELL BEAMER WYSS, a minor, Plaintiff,
V.
CITY OF HOQUIAM. a municipal corporation; et al..
Defendants - Appellees.

Appeal from the United States District Court for the Western District of Washington
J. Kelley Arnold, Magistrate, Presiding

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted July 12, 2004

Before: HAWKINS, THOMAS, and BYBEE, Circuit Judges.

John R. Wyss appeals pro se the district

court's decision denying his motion for summary judgment and granting Defendants-Appellees' ("the City") motion for summary judgment in this 42 U.S.C. § 1983 action. Wyss contends that the district court erred in determining that the City did not "depriv[e] [him] of home and property without compensation," provided adequate procedural due process, and did not effect an unconstitutional "physical invasion and total taking of [his] property for public benefit without compensation." We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's order granting summary judgment. viewing the facts in the light most favorable to the nonmoving party. Olsen v. Idaho State Bd. of Med., 363 R3d 916. 922 (9th Cir, 2004). We affirm.

Wyss asserts that he is entitled to compensation for damages resulting from the order to vacate and the severance of electrical service because he was deprived of property without due process. He contends that he was entitled to a hearing before being ordered to vacate his home because there was no emergency present.

This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Multiple expert declarations in the

record clearly demonstrate Wyss's home was a nuisance likely to seriously injure occupants or visitors. His own conclusory declaration fails to raise a genuine issue of material fact in this regard.

The City exercised its police power in ordering Wyss's home vacated and the electricity disconnected. When immediate action is necessary to protect the public interest, such as when an unsafe nuisance is present, a hearing is not necessary prior to the exercise of police power as long as adequate post-deprivation procedural safeguards exist. Soranno 's Gasco, Inc. v. Morgan, 874 F.2d 1310. 1318 (9th Cir. 1989). There were adequate post-deprivation safeguards here because Wyss was provided a hearing before the Hoquiam Building Code Council. as well as the opportunity to appeal the Council's decision within twenty-one days. Wyss participated in the hearing, but failed to appeal within twenty-one days. The district court properly determined that the City did not violate Wyss's constitutional right not to be deprived of property without due process.

Wyss also contends that the City effected a Fourth Amendment seizure or a Fifth Amendment taking of his "home and property." The record does not support these contentions. As described above, to the extent that Wyss's home itself arguably was seized, it was a reasonable

exercise of the City's police power based on the unsafe condition of the building. See Conner v. City of Santa Ana, 897 F.2d 1487, 1493 (9th Cir. 1990) (holding that the seizure of nuisance vehicles was within the police power). An unconstitutional taking occurs when a property owner is deprived of all reasonable use of a property, including any use that may be less profitable or beneficial than desired. Am. Say, and Loan Ass'n v. County of Marin, 653 F.2d 364, 368 (9th Cir. 1981). A property owner is not entitled to the highest or best use of his property when it would conflict with a valid exercise of the police power. Id. Wyss's home was ordered vacated and demolished, but the use of his land was not otherwise restricted. Wyss was given the option at the council hearing to repair his home, and his land remains usable regardless of the demolition of his home.

The district court correctly determined as a matter of law that Wyss is not entitled to recover damages against the City in this § 1983 action.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04-35020 D.C. No. CV-02-05529-JKA
JUDGMENT
JOHN R. WYSS, individually and as guardian Ad Litem of James Russell Beamer Wyss,
Plaintiff - Appellant,
and
JAMES RUSSELL BEAMER WYSS, a minor,
Plaintiff,
V.
CITY OF HOQUIAM, a municipal corporation; et al.,

Defendants - Appellees.
Appeal from the United States District Court for the Western District of Washington (Tacoma).
This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.
On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.
Filed and entered Wednesday, July 21, 2004

Exhibit 3

Hoquiam City Code Chapter 2.22

DANGEROUS BUILDINGS

Sections:

2.22.010 Uniform code adopted.
2.22.020 Penalties for violations.

2.22.010 Uniform code adopted.

The Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition is incorporated by reference and adopted as the uniform code for repair, vacation, or demolition of dangerous buildings in the city. (Ord. 98-06 § 4, 1998; Ord. 94-10 § 4, 1994; Ord. 91-21 § 3,.1991; Ord. 91-4 § 3, 1991; Ord. 2927 § 1, 1980; Ord. 2797 § 1, 1977; Ord. 2706 § 3, 1975; Ord. 2558 § 1, 1971).

2.22.020 Penalties for violations.

Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not exceeding five hundred dollars or imprisonment not exceeding six months, or by both. (Ord. 2927 § 1, 1980) (Revised 2/99)

Exhibit 4
1997 UNIFORM CODE FOR THE ABATEMENTOF **DANGEROUS BUILDINGS. TM**

TABLE OF CONTENTS

Chapter 4 Notices and Orders of Building Official
Section 401 General
Section 402 Recordation of Notice and Order
Section 403 Repair, Vacation and Demolition
Section 404 Notice to Vacate
Chapter 5 Appeal
Section 501 General
Section 502 Effect of Failure to Appeal
Section 503 Scope of Hearing on Appeal
Section 504 Staying of Order under Appeal

Chapter 4
NOTICES AND ORDERS OF BUILDING OFFICIAL

SECTION 401 — GENERAL

401.1 Commencement of Proceedings. When the building official has inspected or caused to be inspected any building and has found and determined that such building is a dangerous building, the building official shall commence proceedings to cause the repair, vacation or demolition of the building.

401.2 Notice and Order. The building official shall issue a notice and order directed to the record owner of the building. The notice and order shall contain:

1. The street address and a legal description sufficient for identification of the premises upon which the building is located.
2. A statement that the building official has found the building to be dangerous with a brief and concise description of the conditions found to render the building dangerous under the provisions of Section 302 of this code.
3. A statement of the action required to be taken as determined by the building official.
3.1 If the building official has determined that the building or structure must be repaired, the order shall require that all required permits be secured therefor and the work physically commenced within such time (not to exceed 60 days from the date of the order) and completed within such time as the building official shall determine is reasonable under all of the circumstances.
3.2 If the building official has determined that the building or structure must be vacated, the order shall require that the building or structure shall be vacated within a time certain from the date of the order as determined by the building official to be reasonable.
3.3 If the building official has determined that the building or structure must be demolished, the order shall require that the building be vacated

within such time as the building official shall determine is reasonable (not to exceed 60 days from the date of the order); that all required permits be secured therefor within 60 days from the date of the order; and that the demolition be completed within such time as the building official shall determine is reasonable.

4. Statements advising that if any required repair or demolition work (without vacation also being required) is not commenced within the time specified, the building official (i) will order the building vacated and posted to prevent further occupancy until the work is completed, and (ii) may proceed to cause the work to be done and charge the costs thereof against the property or its owner.

5. Statements advising (i) that any person having any record title or legal interest in the building may appeal from the notice and order or any action of the building official to the board of appeals, provided the appeal is made in writing as provided in this code and filed with the building official within 30 days from the date of service of such notice and order; and (ii) that failure to appeal will constitute a waiver of all right to an administrative hearing and determination of the matter.

401.3 Service of Notice and Order. The notice and order, and any amended or supplemental notice and order,

shall be served upon the record owner and posted on the property; and one copy thereof shall be served on each of the following if known to the building official or disclosed from official public records: the holder of any mortgage or deed of trust or other lien or encumbrance of record; the owner or holder of any lease of record; and the holder of any other estate or legal interest of record in or to the building or the land on which it is located. The failure of the building official to serve any person required herein to be served shall not invalidate any proceedings hereunder as to any other person duly served or relieve any such person from any duty or obligation imposed by the provisions of this section.

401.4 Method of Service. Service of the notice and order shall be made upon all persons entitled thereto either personally or by mailing a copy of such notice and order by certified mail, postage prepaid, return receipt requested, to each such person at their address as it appears on the last equalized assessment roll of the county or as known to the building official. If no address of any such person so appears or is known to the building official, then a copy of the notice and order shall be so mailed, addressed to such person, at the address of the building involved in the proceedings. The failure of any such person to receive such notice shall

not affect the validity of any proceedings taken under this section. Service by certified mail in the manner herein provided shall be effective on the date of mailing.

401.5 Proof of Service. Proof of service of the notice and order shall be certified to at the time of service by a written declaration under penalty of perjury executed by the persons effecting service, declaring the time, date and manner in which service was made. The declaration, together with any receipt card returned in acknowledgment of receipt by certified mail shall be affixed to the copy of the notice and order retained by the building official.

SECTION 402 – RECORDATION OF NOTICE AND ORDER

If compliance is not had with the order within the time specified therein, and no appeal has been properly and timely filed, the building official shall file in the office of the county recorder a certificate describing the property and certifying (i) that the building is a dangerous building and (ii) that the owner has been so notified. Whenever the corrections ordered shall thereafter have been completed or the building demolished so that it no longer exists as a dangerous building on the property described in the certificate, the building official shall file a new certificate with the county recorder certifying that the building has been

demolished or all required corrections have been made so that the building is no longer dangerous, whichever is appropriate.

SECTION 403 – REPAIR, VACATION AND DEMOLITION

The following standards shall be followed by the building official (and by the board of appeals if an appeal is taken) in ordering the repair, vacation or demolition of any dangerous building or structure:

1. Any building declared a dangerous building under this code shall be made to comply with one of the following:

1.1 The building shall be repaired in accordance with the current building code or other current code applicable to the type of substandard conditions requiring repair; or

1.2 The building shall be demolished at the option of the building owner; or

1.3 If the building does not constitute an immediate danger to the life, limb, property or safety of the public it may be vacated, secured and maintained against entry.

2. If the building or structure is in such condition as to make it immediately dangerous to the life, limb, propurty or safety of the public or its occupants, it shall be ordered to be vacated.

SECTION 404 – NOTICE TO VACATE

404.1 Posting. Every notice to vacate shall, in addition to being served

as provided in Section 401.3, be posted at or upon each exit of the building and shall be in substantially the following form:

DO NOT ENTER-UNSAFE TO OCCUPY

It is a misdemeanor to occupy this building, or to remove or deface this notice.

Building Official

of

404.2 Compliance. Whenever such notice is posted, the building official shall include a notification thereof in the notice and order issued under Section 401.2, reciting the emergency and specifying thã conditions which necessitate the posting. No person shall remain in or enter any building which has been so posted, except that entry may be made to repair, demolish or remove such building under permit. No person shall remove or deface any such notice after it is posted until the required repairs, demolition or removal have been completed and a certificate of occupancy issued pursuant to the provisions of the Building Code.

Exhibit 5

Rev. Code Wash. § 36.70C.030 (2002)

§ 36.70C.030. Chapter exclusive means of judicial review of land use decisions -- Exceptions

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

Exhibit 6

THE LAW OF
MUNICIPAL
CORPORATIONS
THIRD EDITION
EUGENE McQUILLIN
1998 REVISED VOLUME
By the Publisher's Editorial Staff
VOLUME 7A
Cite as: McQuillin Mun Corp § — (3rd Ed)
WEST GROUP
Bancroft.Whitney . Clark Boardman
Callaghan Lawyers Cooperative Publishing
WESTLAW-West Publishing
Customer Service: 1.800-328-4880
FAX: 1-800.340-9378

MUNICIPAL CORPORATIONS
§ 24.560. — Vacation.

A municipal corporation may have power in an appropriate mode to compel the vacation or closing of an unsafe building.1 But it has been ruled that while a city has authority to close up buildings that are a public nuisance, notice and a hearing2 and an opportunity to correct the defect[3] must be afforded the owner. Thus, a municipality cannot by ordinance declare a particular building a public nuisance, eject the occupants summarily and take charge of the building and its contents.[4] However, in an emergency situation, there may be no

right to due process prior to the taking of summary action.[5]

1 Connecticut. Gorra Realty, Inc. v. Jetmore, 200 Conn 151, 510 A2d 440.
Kentucky. Corbin v. Hays, 244 Ky 33, 50 SW2d 31.
New York. Henderson v. Gillroy, 203 Misc 465, 115 NYS2d 674.
Washington. Coffin v. Blackwell, 116 Wash 281, 199 P 239.
[2] New York. Thornton v. Chase, 175 Misc 748, 23 NYS2d 735.
[3]North Dakota. City of Minot v. Freelander, 426 NW2d 556 (ND 1988).
Texas. Roper v. Winner, 244 SW2d355 (Tex Civ App).
[4]Kentucky. Corbin v. Hays, 244 Ky33, 50 SW2d 31.
5 Connecticut. Gorra Realty, Inc. v. Jetmore, 200 Conn 151, 510 A2d 440.

Supreme Court, U.S.
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NOV 18 2004
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(4)

No. 04-523

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN R. WYSS, et. al.,

Petitioners,

v.

CITY OF HOQUIAM, et. al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit No.: 04-35020

RESPONDENT CITY OF HOQUIAM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF FACTS 3

A. Statement of Facts and Procedural History 3

B. Correction of Misstatements in Petition for Certiorari 11

III. ARGUMENT 13

A. The Decisions Below Are Consistent With Well Established Precedent Holding That A Post Deprivation Hearing Satisfies Due Process Where There Is A Need For Quick Action To Protect Public Health And Safety 13

1. The decisions below do not conflict with Supreme Court precedent 13

2. The decisions below are consistent with holdings in other Circuit Courts of Appeal 16

B. Petitioner's Disputes With Conclusively Established Facts Do Not Justify Acceptance Of Review 19

IV. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 2

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) 17

Coffin Brothers & Co. v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928) 15

Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378 (1930) 15

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) . 1, 2, 21

Dubinka v. Judges of the Superior Court, 23 F.3d 218 (9th Cir. 1994) 2

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) 14

Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) 14

Freeman v. City of Dallas, 242 F.3d 642 (5th Cir. 2001) 19

Harris v. City of Akron, 20 F.3d 1396 (6th Cir. 1994) 16-17, 19

Independent Towers of Washington v. Washington, 350 F.3d 925 (9th Cir. 2003) 2

International Union of Bricklayers v. Martin, 752 F.2d 1401, (9th Cir. 1985) 2

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, (1992) 20

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 14, 15

McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929) 15

Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) 20

North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) 14

Olson Farms, Inc. v. Barbosa, 134 F.3d 933 (9th Cir. 1998) .. 2

Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921) 15

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 14-18

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 1, 2, 21

Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir. 1996) 2

United States v. Richardson, 418 U.S. 166,
94 S.Ct. 2940, 41 L.Ed.2d 678 (1994) 2

Workwide Church of God v. McNair, 805 F.2d 888,
(9th Cir. 1986) 2

Wyss v. City of Hoquiam, 111 Wn. App. 1001,
No. 25907-9-II (Washington Court of Appeals,
Division II, April 5, 2002), review denied, 147
Wn.2d 1025, 60 P.3d 93 (December 3, 2002) 1, 8

Statutes

42 U.S.C. ¶ 1983 ..... 1, 2, 17

Fifth Amendment 17
Fourteenth Amendment 17

Uniform Code for Abatement of
Dangerous Buildings 6, 12, 18, 19
Section 302 11
Section 404 18
Section 404.1 6
Section 504 18

Court Rules

Supreme Court Rule 10 ..... 19, 21

I. STATEMENT OF JURISDICTION

Petitioner Wyss does not address the applicability of the *Rooker-Feldman* doctrine, which is jurisdictional in this matter. The District Court held that the Petitioner's claims were inextricably interwoven with matters established in state review proceedings arising from Petitioner's appeal of the City's Notice and Order to Vacate and Demolish his dangerous building. The Court, therefore, held that under the *Rooker-Feldman* doctrine, it lacked the authority to disrupt the findings of the City administrative appeals board that were upheld after Petitioner's unsuccessful appeal to the State Court of Appeals. *Wyss v. City of Hoquiam*, 111 Wn. App. 1001, review denied 147 Wn.2d 1025 (2002).

The District Court correctly recognized the conflict resulting from the attempt in this action to seek damages under § 1983 after the state courts rejected the Petitioner's efforts to overturn the City's findings that his building was dangerous and constituted a public nuisance. Petitioner's federal action sought a second untimely bite at the apple to contradict the state findings and establish that his building was not dangerous, did not need to be vacated and was not a nuisance. The District Court held that such contentions are barred by the *Rooker-Feldman* doctrine. District Court Order, at 7-8.

The *Rooker-Feldman* doctrine precludes lower federal courts, including the District Court, from considering challenges to the final determinations of state courts. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The only recourse for challenging such determinations is by appeal of the state court

decision to the United States Supreme Court, not by filing a new federal lawsuit under 42 U.S.C. §1983. *See Workwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986). Wyss did not appeal the state court's rulings to the Ninth Circuit and has not addressed this issue in his jurisdictional statement in the Petition for Certiorari.

The *Rooker-Feldman* doctrine is jurisdictional and deprived the federal courts of jurisdiction to review a state court judgment, even if the plaintiff alleges constitutional claims or if the decision is not from the highest court of the state. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994). The doctrine also applies to administrative decisions reviewed by state courts, such as the City of Hoquiam Building Code Council decision at issue here. *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933 (9th Cir. 1998).

By failing to assign error to the District Court's dismissal for lack of jurisdiction under the *Rooker-Feldman* doctrine, Wyss has abandoned his right to appeal this issue. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996); *International Union of Bricklayers v. Martin*, 752 F.2d 1401, 1404 (9th Cir. 1985). The Court should follow the well established rule that it will not consider claims that are not actually, specifically and distinctly argued in the courts from which review is sought. *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997); *United States v. Richardson*, 418 U.S. 166, 206, 94 S.Ct. 2940, 2961, 41 L.Ed.2d 678 (1994). *Independent Towers of Washington v. Washington*, 350 F.3d 925 (9th Cir. 2003). Because Wyss failed to challenge a dispositive ground for dismissal of his case, the Court should not accept review of the Petition because the federal courts lack jurisdiction under the *Rooker-Feldman* doctrine.

II. STATEMENT OF FACTS

A. Statement of Facts and Procedural History

Petitioner submits a Statement of the Case which is riddled with errors and misstatements of the evidence presented to the District Court in Respondent City of Hoquiam's Motion for Summary Judgment. The correct facts, as established by the uncontradicted evidence presented to the District Court is set forth herein.

As noted by the Ninth Circuit's opinion, (Appendix at 25-26), the City moved for summary judgment based upon multiple expert declarations establishing that the building was an immediate danger requiring prompt action. Wyss offered no evidence to contradict the declarations of the City Building Official, Assistant City Fire Chief, City Code Compliance Officer, County Environmental Health Department and personnel from the Aberdeen Neighborhood Housing Service, who all testified that the building was dangerous to anyone that remained inside.

The building owned by John R. Wyss is located at 314 Lincoln Street in the City of Hoquiam. The building was over 75 years old and had a long history of complaints to the City. The building was a two story, eight unit apartment building with approximately 6,700 square feet. In January 1998, John Wyss contracted to buy the property, intending to rehabilitate the structure. However, despite his plans, Mr. Wyss did not obtain any permits from the City to conduct repairs. In April or May of 1999, Wyss began living inside one of the second floor apartments in the building. Mr. Wyss occasionally allowed his four year old son, John Russell Beamer Wyss to stay in the

building with him. He also was sometimes visited by guests, including minor children.

Soon after purchasing the building, Mr. Wyss contacted the County Assessor to request a reduction in his taxes. He informed the Assessor's Office that the building had no value due to its deteriorated condition. According to Mr. Wyss, the building actually had a negative value due to the high cost of repairs needed. As a result, the County reduced the assessed value of the building to zero.

On June 30, 1999, the City responded to further complaints and visited Mr. Wyss at the building. On July 23, 1999, the City conducted an inspection. The inspection team included the City Building Official, Susan Mollett,[1] the City Code Compliance Officer, Orlando Howell, Jim Tobey of the Grays Harbor Environmental Health Department, and Assistant Fire Chief Ray Pumphrey. Also present were Pat Beaty, a Construction Specialist, and David Murnen, Assistant Director for Aberdeen Neighborhood Housing Service, a nonprofit corporation that assists in obtaining affordable housing.

The conditions in the building revealed little progress in correcting the defects and making the repairs that Wyss had identified the previous year. The conditions observed by the inspectors clearly indicated that the building was a major hazard to anyone inside.

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[1] Subsequent to the filing of this lawsuit, Defendant Susan Vasey was married and is now named Susan Mollett.

The Building Official's Declaration, notes that the building was described by the August 31, 1999 order to be in a "dangerous and dilapidated state" with "serious safety and health conditions," "unfit for human habitation" and a "fire hazard." Her uncontradicted expert opinion testimony was that the building was immediately dangerous and threatened public safety.

The City Fire Marshal likewise determined the building to be an immediate fire hazard. It was so dangerous that fire crews were instructed not to enter the first floor. These statements were provided to the Petitioner as attachments to the City's August 31st order.

Likewise, the Grays Harbor County Health Department reported that the building was "unfit for human habitation and was a danger to all who entered it." Because, in Mr. Tobey's judgment, the building posed a "very great potential to cause grievous bodily harm to anyone inside of the structure should it collapse," he recommended that it be abated "as soon as possible, before being allowed to have further human habitation." Again, the Health Department report was attached to the City's order to notify Wyss that the building was a risk to anyone who occupied it.

Perhaps the most compelling evidence concerning the pervasive defects in the building at 314 Lincoln was demonstrated by a 21 minute videotape shot by the Aberdeen Neighborhood Housing Services. The tape, shot on February 29, 2000, shows the interior of the building after the completion of the hearing, as the City made preparations to demolish the building. Significantly, the dilapidated condition of the building

epicted by this tape was identical to the conditions observed uring the July 23, 1999 inspection.

Pursuant to the Uniform Code for Abatement of)angerous Buildings (hereafter "the Abatement Code") the 3uilding Official reviewed the reports and issued a Notice and)rder to Vacate and Demolish the building on August 30, 1999. 'he Notice and Order allowed Mr. Wyss 30 days to vacate the remises so that he would have time to remove his belongings nd move to alternative housing. It also informed him of his ight to appeal to the City Building Code Council (hereafter BCC").

Mr. Wyss did not vacate the building as required by the)rder. Instead, on September 21, 1999, he deeded the portion f the property not covered by the building to his four year old on, John Russell Beamer Wyss. Wyss admitted that the ossibility of a lien to cover the City's abatement was a factor in xecuting this deed. Shortly thereafter, he filed an appeal to the 'ity BCC on September 29, 1999. When the 30 day period to acate under the City's Notice and Order had elapsed, Mr. lowell posted "DO NOT ENTER" signs on the building as equired by Section 404.1 of the Abatement Code. He first osted these signs on October 5, 1999. The signs were removed nd the building remained occupied. On October 14, 1999, Mr. lowell again posted the building with the signs required by ection 404.1 of the Abatement Code. The building remained ccupied, as shown by ongoing electrical use, lights and Wyss' arked car next to the building.

The City Building Official was concerned about the risk f fire if the building remained connected to electricity. A fire ad recently broken out at a nearby abandoned building because

obsolete electrical wiring remained connected to power. To prevent a similar fire here, the City Building Official requested Grays Harbor P.U.D. to disconnect the electricity at 314 Lincoln.

The request to disconnect electricity was by a letter dated October 22, 1999 and was received by the P.U.D. on or about October 22, 1999. The City's letter advised the PUD that the building was declared a dangerous building and a nuisance and requested that power be disconnected.

Upon receipt of the notice that the Petitioner's building was dangerous, the P.U.D. disconnected the electrical service on October 22, 1999.[2] The City scheduled a hearing for November 10, 1999 to consider Mr. Wyss' appeal. This hearing was continued for good cause because the Building Official was ill with pneumonia. It was reconvened three weeks later on December 1, 1999. At that hearing, the BCC heard testimony from Mr. Wyss and City witnesses. Despite reservations over lack of progress in the 18 months that elapsed after acquiring the building, the council nevertheless voted to allow Mr. Wyss an additional 30 days to submit plans for rehabilitation of the building and apply for permits. Otherwise, it affirmed the Notice and Order to Vacate the building and denied Mr. Wyss' appeal.

Mr. Wyss was present when this decision was announced at the conclusion of the hearing. The BCC issued its written decision on December 8, 1999. As required by the Abatement Code, this decision was served on Mr. Wyss by certified mail at the address listed in the Assessor's tax records. It was also sent

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[2] Petitioner's Informal Brief at 3, ¶ 9.

to him by regular mail. The certified mail was returned, but the regular mailing was not. Mr. Wyss did not avail himself of the opportunity to seek permits for rehabilitation of the building. He did not submit rehabilitation plans or apply for any permits to rehabilitate the building. When the period for submission of these plans elapsed, the City began abatement proceedings by seeking demolition bids and contracting for an asbestos survey. On January 19, 2000, the City recorded a notice that the building had been declared dangerous, was ordered demolished and that the owner had been notified.

After the abatement process was commenced, on February 14, 2000, Wyss sent a check to the City and asked for a demolition permit. Mr. Wyss did not submit any plans, demonstrate how he would accomplish the demolition of the building and had, for over 18 months demonstrated his inability to follow through on promises to care for the building. In light of these factors, the City sent Mr. Wyss
a letter on February 22, 2000 returning his check and stating that the City would proceed with the abatement process. Mr. Wyss, however, had on that same day, February 22, 2000 filed a lawsuit in state court seeking to appeal the BCC decision.

Mr. Wyss' attempted appeal of the BCC decision was dismissed as untimely by the Grays Harbor County Superior Court on March 20, 2000. The Court determined, that the BCC decision had been properly served by the City on Mr. Wyss. This decision was upheld on appeal by the State Court of Appeals in an unpublished decision. *Wyss v. City of Hoquiam*, 111 Wn. App. 1001, No. 25907-9-II (Washington Court of Appeals, Division II, April 5, 2002), review denied, 147 Wn.2d 1025, 60 P.3d 93 (December 3, 2002).

The dismissal of Wyss' state court appeal affirmed the administrative decision of the City Building Code Council. The following facts were, therefore, conclusively established by the December 8, 1999 decision, as affirmed by the state courts:

1. Since at least 1998, the property has been the subject of numerous citizen complaints because of inadequate maintenance, dilapidation, decay, electrical wiring problems, etc. which has caused the property to constitute a public nuisance.

2. Wyss failed to obtain building permits for repairs or inspection for repairs that he claimed were performed. Wyss' testimony established that not all of the necessary work to abate the public nuisance was accomplished.

3. The building has wracked, warped, buckled and settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than required in the case of similar new construction.

4. Portions of the building are likely to collapse and thereby injury persons or damage property.

5. The building constituted a safety hazard to all occupants. It was unfit for human habitation and presented a potential rodent harborage. Further deterioration created a very great potential to cause grievous bodily injury to anyone inside the building or in the immediate vicinity should it collapse.

6. The building is a fire hazard, due to obsolescence, dilapidated condition, deterioration, damage, inadequate exits, and lack of sufficient heating apparatus.

7. The building is in such a condition as to constitute a public nuisance.

8. There is stress in materials, members or portions thereof, due to all live and dead loads which is more than two times the working stress allowed in the Building Code for similar new buildings.

9. Portions of the building are likely to fail, become detached or dislodged, or collapse and thereby injure persons or damage property.

10. The building or portions thereof are manifestly unsafe for the purpose for which it is being used.

11. The building has exterior walls or structural members that list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one third of the base.

12. The building at 314 Lincoln is a "dangerous building" as defined by Section 302 of the Abatement Code.

13. The City's order to vacate the premises was AFFIRMED.

B. Correction of Misstatements in Petition for Certiorari.

The facts alleged in the Petition contain numerous errors and misstatements. Wyss describes the conditions in his building as "minor code violations" and states that there was "a need for typical repairs." Petition at 5, 20. In fact, the conditions were severely dangerous, as noted above, such that the building was determined by the Building Code Council to be manifestly unsafe and a public nuisance. The City's declarations showed that the building was an immediate fire hazard, was warped and buckled in places, lacked watertight roofing and siding (as evidenced by standing water inside light fixtures!), had water underneath the foundation and was missing flooring. The ingress and egress through first floor entrances was severely impaired because the building had settled by several feet.

Wyss contends that the City's order to vacate did not recite an emergency. Petition at 5-6. The City's notice contained inspection reports of the fire marshal and health inspector which found the building to be unsafe to all who entered.

Wyss contends that the courts below failed to analyze the City's actions to determine if they complied with applicable City codes, namely the Uniform Code for Abatement of Dangerous Buildings. Petition at 18-27. The answer to this charge is simple: Petitioner did not raise these arguments to the courts below and is barred from making new arguments in his petition to the Supreme Court. Indeed, many of the arguments that he now attempts to raise should have been made to the City Building Code Council at the hearing which followed the City's notice and order to vacate and abate the nuisance.

Wyss claims that he was "working to prepare the building for total renovation." Petition at 20. The unrefuted evidence presented to the District Court was that he had failed to make any substantial progress towards renovations for a year and a half prior to issuance of the City's Order. Nevertheless, Wyss could have then presented evidence of this renovation plan to the City Building Code Council. He failed to do so and did not present any such evidence in proceedings below. Wyss has never offered any explanation as to why, after the City Building Code Council gave him the opportunity to conduct repairs at the December 1, 1999 hearing, he failed to seek permits within the time period allowed. Moreover, Wyss' testimony of record in this case shows that he did not have any plan of renovation capable of curing the myriad defects in the building in any timely fashion. Wyss failed to take any meaningful action prior to the City's inspections. Instead, he chose to move into a

dilapidated, unsafe building, thereby threatening the safety of himself and his guests, which at times included his four year old child and teenagers living in the neighborhood.

Petitioner alleges that City officials caused greater damage and deterioration (Petition at 7, 22) were not supported by any evidence. His claims that City officials shut down fans, or a ventilation system, broke down doors and allowed the property to be vandalized are completely unfounded. None of the City's witnesses even recalled seeing a "ventilation system" in the building. Wyss presented no evidence that the City made conditions worse. The City's witnesses testified that the conditions observed in February 2000, after Wyss had been given a full hearing by the City, were virtually identical to the dilapidated and dangerous conditions observed when the original notice and order to vacate was issued in August 1999.

III. ARGUMENT

A. The Decisions Below Are Consistent With Well Established Precedent Holding That A Post Deprivation Hearing Satisfies Due Process Where There Is A Need For Quick Action To Protect Public Health And Safety.

1. The decisions below do not conflict with Supreme Court precedent.

Wyss claims that the City failed to provide procedural due process in issuing the orders to vacate and demolish the dangerous building located at 314 Lincoln in Hoquiam. However, his Petition fails to identify any conflict with the

decisions of this Court or with the decisions of any Circuit Court of Appeals.

The Supreme Court has often noted that due process is a flexible concept that varies with the particular circumstances of each case. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The core requirement of procedural due process is to provide notice and an opportunity to be heard at a meaningful time. *Id.*

Where there is a need for quick action, the dictates of due process are met by providing an opportunity to be heard after the deprivation occurs. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In *Parratt*, the Court recognized that not every deprivation of a property interest requires a prior hearing, especially where compelling interests such as the need to protect public safety demand immediate action by public officials charged with protecting health and safety.

The Petitioner relies on a portion of Justice Blackmun's concurring opinion in *Parratt v. Taylor*, but ignores the majority's holding that a post deprivation hearing may be justified under circumstances where there is a need for quick action to protect the public interest. In *Parratt v. Taylor*, the Court considered Petitioners' contention that a prior hearing is mandated by due process and cited numerous cases where the Court held otherwise. 451 U.S. at 538-541, citing *inter alia*. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (seizure and destruction of unwholesome food without a preseizure hearing); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (seizure and destruction of drugs without a

preseizure hearing); *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) (immediate seizure of banking assets to protect against mismanagement); *see also Corn Exchange Bank v. Coler*, 280 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378 (1930); *McKay v. McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929); *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); and *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921).

In considering these cases, including those cited by the Petition, the Court in *Parratt* refutes Petitioner's argument, stating:

> However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

451 U.S. at 540-541, 101 S.Ct. at 1915-1916.

Here Petitioner was given the prompt, full and meaningful hearing as contemplated by *Mathews v. Eldridge* and *Parratt v. Taylor*. However, because the building he previously occupied was an immediate danger, the Building Official acted properly in ordering him to vacate the structure. Nothing in the Petition demonstrates that the lower courts mis-applied the dictates of due process as set forth in these cases. Because

Petitioner misunderstands those requirements, he erroneously concludes that there is a conflict with

this Court's prior rulings. To the contrary, both the District Court and Ninth Circuit faithfully followed these well established precedents.

The rule urged by Petitioner would undermine the ability of public officials to protect public health and safety against immediate threats. A rule requiring a predeprivation hearing would prevent emergency posting of buildings damaged by natural disasters, such as earthquakes or hurricanes, in addition to those which become dangerous due to the systematic neglect of the property owner, as was the case here. Fortunately, this Court has established a better rule by allowing a prompt post-deprivation hearing in these types of cases. Petitioner suggests no reason to abandon this well reasoned line of cases.

2. <u>The decisions below are consistent with holdings in other Circuit Courts of Appeal</u>.

Petitioner fails to identify any conflict with cases from other Circuit Courts of Appeal. The due process principles articulated by *Parratt v. Taylor* have been expressly followed by various Circuit Courts of Appeal in cases involving immediately dangerous buildings. Petitioner cites no cases to support his contention that such a conflict exists. In *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994), the Sixth Circuit rejected a procedural due process claim asserting that a hearing was required prior to demolition of a dangerous building. The Sixth Circuit held otherwise, stating:

> In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the Supreme Court explicitly held that in some situations a state may satisfy procedural due process by providing "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Id.* at 539, 101 S.Ct. at 1915. When the situation necessitates "quick action" by the state or makes efforts to provide a meaningful predeprivation process impracticable, the persons acting under state authority may proceed without violating the property owner's rights so long as the state provides an adequate postdeprivation procedure. *Id.* Such a procedure satisfies the "fundamental requirement of due process"--an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 540, 101 S.Ct. at 1915 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).

20 F.3d at 1401.

Harris involved similar § 1983 claims including allegations that the city took property for a public purpose without paying any compensation, in violation of the Fifth Amendment, and deprived property without due process in violation of the Fourteenth Amendment. *Harris* involved an emergency demolition of a building, which occurred prior to any opportunity for the owner to have his objections heard. Like the Ninth Circuit held here, the Sixth Circuit in *Harris* held that in

such circumstances, a prompt post-deprivation hearing satisfied constitutional due process requirements.

In this case, the City's code provides for a predeprivation hearing in virtually all cases. The obligation to comply with an order to repair or demolish a dangerous building is stayed pending the outcome of these hearings, except for an order to vacate a dangerous building. Here, the City did not demolish the building before the hearing, but it did require that it be promptly vacated. The building was posted as required by Section 404 of the Uniform Code for the Abatement of Dangerous Buildings. Only when Petitioner refused to vacate the building, did the City request disconnection of electrical service, consistent with state utility regulations.

Section 504 of the Uniform Code for Abatement of Dangerous Buildings recognizes an exceptional circumstance where conditions are so dangerous that they threaten public safety and require vacation of a dangerous building under Section 404 of the Abatement Code. In these circumstances, public safety is the paramount consideration and the building must be vacated until a hearing is conducted to determine the validity of the City's determination. A postdeprivation hearing in the former situation is justified by the need for quick action to safeguard health and safety, as determined by the building official. *Parratt v. Taylor, supra.*

A full hearing with opportunity to call witnesses and cross examine City witnesses was held on December 1, 1999. The City Board of Appeals issued its decision ten days later containing findings of fact and conclusions of law. The decision upheld the order to vacate the premises. The Board upheld the factual determinations of the Building Official that the building

was a nuisance and was dangerous to all who entered it, including Mr. Wyss and any social guests. Wyss failed to timely appeal the Board's ruling and the state courts upheld dismissal of his untimely appeals.

The only Circuit Court case outside the Ninth Circuit cited by Petitioner does not conflict with the ruling in this case. *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) upheld the City's condemnation and destruction of apartment buildings against a Fourth Amendment challenge. The Fifth Circuit's en banc opinion found that regulation of nuisances was at the heart of the City's police powers and was eminently reasonable. 242 F.3d at 652.

There is no conflict created here because the City of Hoquiam, like the City of Dallas, followed well established standards for determining whether a building is dangerous. Those standards are embodied in the Uniform Code for Abatement of Dangerous Buildings. The building official determined that the building violated these standards and her determination was upheld by the City Building Code Council after consideration of Wyss' appeal. The Ninth Circuit's decision here is fully consistent with the results and reasoning of the Sixth Circuit in *Harris* and the Fifth Circuit in *Freeman*.

B. Petitioner's Disputes With Conclusively Established Facts Do Not Justify Acceptance Of Review.

Petitioner fails to demonstrate any of the factors set forth by Supreme Court Rule 10 for acceptance of review. The Petitioner fails to identify any important question of federal law

that this Court needs to settle. Instead, Petitioner appeals solely to the sympathy of the court instead of demonstrating any errors by the lower courts.

Petitioner argues that his petition should be granted because he was living in the dangerous building which was his "home." Although it is a sad fact of life that some persons see fit to occupy neglected and unsafe structures, this does not overcome the clear and substantial interest of the City in the protection of human life, including that of the Petitioner. By requiring him to vacate the building, the City acted for his protection, and to protect others who occasionally visited the property, including minor children who Wyss periodically invited to the property.

The City's actions here are consistent with well established authority to safeguard the public under its police powers. *See Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887) holding that no compensation is owed under the Takings Clause where action is taken to prohibit "noxious" uses of property--*i.e.*, uses of property akin to "public nuisances." Modern takings cases also acknowledge that a city may act to prevent serious public harm by abating nuisances without incurring liability for takings, even if all economically viable use of property is deprived. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, (1992). Because the City acted to protect public health and safety against a clear threat to public health and safety, no compensation is owed.

Petitioner Wyss cannot accept the factual rulings made in numerous prior proceedings by the City Building Code Council, by the state courts that upheld the City's rulings, as

well as by the District Court and Ninth Circuit. The Petition is based on allegedly erroneous factual determinations and does not identify any error in the lower court's statements of the applicable law. He can only allege that it was misapplied in his particular case. It is well established that such grounds are rarely sufficient to support granting of a Petition for a Writ of Certiorari. Supreme Court Rule 10.

IV. CONCLUSION

Petitioner failed to timely challenge the City's administrative findings and cannot seek to overturn them in this proceeding. Because the factual findings of the state Court of Appeals and City Building Code Council are inextricably intertwined with the civil rights allegations made by Wyss, the District Court properly refused to consider them under the *Rooker-Feldman* doctrine. On this basis alone, which was not challenged in the Ninth Circuit by Petitioner, the Court should reject the Petition for Writ of Certiorari.

The actions of the City here were valid exercises of the police power which respected Wyss' right to be heard. Petitioner was provided a timely and meaningful opportunity to be heard consistent with due process, before any demolition was required and promptly after being required to vacate this dangerous building. It is clear that Wyss had no property right consistent with background principles of property law to maintain his building in a dangerous, dilapidated and unhealthful state so as to constitute a public nuisance. The District Court properly determined that the City's requirement to abate such a nuisance is not a compensable taking. The District Court's

granting of summary judgment was properly affirmed by the Ninth Circuit.

Respectively Submitted this 17th day of November, 2004.

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(3)

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NO.04-523

IN THE
SUPREME COURT OF THE
UNITED STATES

John R. Wyss, et al.,
Petitioners,

v.

City of Hoquiam, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

REPLY BRIEF OF JOHN R. WYSS, ET AL.

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Table of Contents

Table Of Cited Authorities.....pg.ii

I. REVIEW OF THE COURT BELOW'S DECISION IS WARRANTED BECAUSE RIGHTS OF HOMEOWNERS ARE OF NATIONAL IMPORTANCE.....Pg. 1

II. "1997 UNIFORM CODE FOR THE ABATEMENT OF DANGEROUS BUILDINGS" LIMITS CITY EXERCISE OF POLICE POWER WHILE APPEAL IS PENDING.....Pg. 4

Conclusion.....Pg 7

TABLE OF AUTHORITIES

CASES

Department of Insurance v. Church Members Relief Ass'n, 217 Ind.58,26 N.E.2d 51, 128 A.L.R. 635 8
Fuentes v. Shevin, 407 U.S. 67 (1972)at 90-92 2
Monroe v. Pape, 365 U.S. 167, (1961) 7
Parratt v. Taylor, 451 U.S. 527 (1981). 7
People v. Gibson, 53 Colo. 231, 125 P. 531 8
Roper et al. v. Winner et al., No. 12340,Court of Civil Appeals of Texas, San Antonio 244 S.W.2d 355; 1951 7

OTHER AUTHORITIES

28 Am.Jur., ... 9
43 Am.Jur. Public Officers Sec. 249 8
Magna Charta, June 15, 1215 9

I.

REVIEW OF THE COURT BELOW'S DECISION IS WARRANTED BECAUSE RIGHTS OF HOMEOWNERS ARE OF NATIONAL IMPORTANCE

In their opposition, Respondents concernedly remark "Although it is a sad fact of life that some persons see fit to occupy neglected and unsafe structures, this does not overcome the clear and substantial interest of the City in the protection of human life, including that of the Petitioner. By requiring him to vacate the building the City acted for his protection, and to protect others who occasionally visited the property" (Brief in Opposition, page 20, lines 7-13)

City gives no support that any of the occasional visitors, mostly neighbors who had been friends with the prior owner of the home were ever exposed to hazard. The remarks are simply condescending.

In fact, all supporting evidence regarding the claims Hoquiam makes about the condition of the building are self serving, and generated after it forced the owner from the building, allowed vagrants, vandals and months of bad weather to further damage the structure, which the Petitioner had taken care to protect for a complete renovation, and maintained an effective system of fans, pumps, heat and aeration to protect the foundation and framework of the structure. The cutting of power to the building at building inspector's request on October 22, 1999, while Petitioner was

awaiting his hearing, scheduled for December 1, 1999 caused great damage.

City action constituted a deprivation of Due Process or Equal Protection. City official did not act lawfully under a "narrowly drawn statute"

> "the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Fuentes v. Shevin, 407 U.S. 67 (1972)at 90-92.

Here, said "narrowly drawn statute" is the 1997 Uniform Code for the Abatement of Dangerous Buildings; §403.1; §404; §501.1 and §504.

Persons initiating the seizure of Petitioner's home had no concern for adherance to the law, and instead abused its police power in commission of its arbitrary acts, now claiming they were for Petitioner's own "protection".

As noted prior, over 18 months of Petitioner's occupancy never resulted in a single injury or incident involving hospitalization or a police report. This fact alone casts doubt upon the Respondents concern for anything other than not being held responsible for its willful torts.

In discovery attempts Hoquiam's answers were considered "disingenuous" by the District Court Judge, the Honorable J. Kelly Arnold, in granting MOTION TO COMPEL to Petitioner(Order, United States District Court, Western District Of Washington, No. CO2-5529, July 9, 2003).

Shortly after that, Hoquiam ignored three subpoenas properly issued and served upon officials of Hoquiam August 11, 2003, wherein Petitioner asked for documents for his discovery. Hoquiam's attorneys denied any need to respond, under their claim that everything asked for had already been voluntarily given by them. The documents requested have never been produced by Hoquiam, due to that stonewalling and lack of cooperation.

Petitioner's resources and legal acumen barely compete with the several high profile "guns for hire" attorneys paid for by the Washington Cities Insurance Authority, which defends Hoquiam in its railroading down of homeowners' rights.

City agenda is to push through its desire of aesthetics changes to main street as cheaply and quickly as possible has outweighed the importance of adhering to laws which it adopted, or rights which the 1997 Uniform Code For The Abatement Of Dangerous Buildings provides for all effected homeowners.

II.

"1997 UNIFORM CODE FOR THE ABATEMENT OF DANGEROUS BUILDINGS" LIMITS CITY EXERCISE OF POLICE POWER WHILE APPEAL IS PENDING.

City of Hoquiam, Washington, after adopting 1997 Uniform Code For The Abatement of Dangerous Buildings, brought an abatement action against Petitioner, then forced property owner from his home just 30 days after merely sending its "notice and orders" to Petitioner, without first providing an opportunity to a hearing by its "Board of Appeals", even though Petitioner's appeal to the Board was timely filed.

Said 1997 Uniform Code For The Abatement of Dangerous Buildings specifically outlaws Hoquiam's action, and the Code's Section 5, Appeal, is written to guard a homeowner's protected rights. In violating homeowner's appeal rights under its abatement code relating to "dangerous buildings", by prematurely executing its "notice and orders" Hoquiam violated Petitioner's rights to Due Process and Equal Protection, *ipso facto*.

Hoquiam's opposition, and the decisions of the Courts' below, fail to address Hoquiam's breach of said Code's Section 5, Appeal and its well defined homeowner rights regarding any abatement of any "Dangerous Building".

Once adopted as its law, Hoquiam does not have an option of regarding one "dangerous building" as being more dangerous than others to which it would

apply the code, and thus in a standardless, arbitrary or selective method to not apply due process and hearing rights of the code.

Thus, Hoquiam's legitimate exercise of police power only extends to within the scope of its adopted code:

> 1997 Uniform Code for the Abatement of Dangerous Buildings:
> Chapter 1, TITLE AND SCOPE, Section 102- PURPOSE AND SCOPE
> 102.2 Scope. "*The provisions of this code shall apply to all dangerous buildings, as herein defined,* which are now in existence or which may hereafter become dangerous in this jurisdiction."
> (italics added)
> Chapter 2, ENFORCEMENT, Section 205- BOARD OF APPEALS
> 205.1 General. "..The building official shall be an ex officio member and shall act as secretary to the board, but shall have no vote upon any matter before the board. *Appeals to the board shall be processed in accordance with the provisions contained in Section 501 of this code.*" (excerpt)

Under the property owner's right to appeal in Section 501.1 Appeal, prior to "Enforcement of Any Order", as described in the Petitioner's Reasons For Granting The Writ (Petition, pages 18-27), nothing shy of a clear and present emergency

could legitimately remove the homeowner from his home prior to his hearing on his timely filed appeal, EVEN IF the building is a "dangerous building".

The Code, adopted by Hoquiam, clearly under Section 504- Staying of Order Under Appeal, stays execution of any "notice and order" (Petition, page 24). Any action to enforce is forbidden.

Nor does "Qualified Immunity" apply to perpetrators of the deprivations to Wyss, under the excuse that an immediate need existed at the time to protect health and safety of the public.

No provisions of the abatement codes allowed for other than proper procedure for a hearing prior to enforcement of any orders of the building official, in fact the Code forbids other than a proper procedure:

> 205.2 Limitations of Authority. The board of appeals shall have no authority relative to interpretation of this code nor shall the board be empowered to waive requirements of this code.

The building official illegally and prematurely enforced an order while an assured hearing was pending, as evidenced by the city official's posting of "DO NOT ENTER" on October 5th, 1999, and its letter of October 22nd, 1999 to Grays Harbor P.U.D. calling for power disconnection, and the P.U.D.'s cutting of wires to the property immediately to

make certain occupancy of home could not continue.

No one acted properly under warrant or a specific code or statute, nor in a clear case of emergency in the deprivation of Wyss's protected rights:

> Monroe v. Pape, 365 U.S. 167, (1961): "The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did"

Respondent appears to purposely misconstrue Petitioner's reference to Parratt v. Taylor, 451 U.S. 527 (1981).

In considering the analysis in Parrat, Justice Blackmun would probably not have found that Hoquiam's actions to throw a homeowner out while he lawfully awaited a scheduled hearing to be legitimate use of its police power, nor would he think Hoquiam's disregard for its own adopted codes by not observing a stay of order under appeal were "random and unauthorized", as opposed to the serious illegal offenses that they were.

Although not federal, references to Constitutionally protected rights abound in the following excerpts from the case: Roper et al. v. Winner et al., No. 12340,Court of Civil Appeals of Texas, San Antonio 244 S.W.2d 355; 1951 Tex.

App., discussing the importance of appeal and hearing rights, and the need to hear prior to seizure of a home:

> "Even the powers of the Building Official have been stated in the Building Code, and they are measured by the terms of that grant. Those powers "must be executed in the manner directed and by the officer specified"43 Am.Jur. Public Officers Sec. 249; People v. Gibson, 53 Colo. 231, 125 P. 531. The right to take action against owners of buildings depends upon legislation which is here embodied in the City Building Code, and it fails to authorize such action as was undertaken by the city officers. The officers are not without authority to proceed as the ordinance permits; they are without authority to proceed otherwise. Department of Insurance v. Church Members Relief Ass'n, 217 Ind.58,26 N.E.2d 51, 128 A.L.R. 635.
>
> (continued.....)"The doors were closed without notice, without hearing, whether the owners were guilty or innocent, right or wrong, with no opportunity to correct the defects, and contrary to and in excess of the method required by the very law invoked by the authorities here sued.
>
> "It is urged that equity does not enjoin the prosecution and punishment of offenses under penal

ordinances, and we agree with that principle. What law is here being enforced? If it be the Building Code, then the proper official in the proper manner must do so. (continued.....) "The Code provided effective pains and penalties for violations and a method to compel compliance by building owners, but those methods were not used and that power was not exercised. We have been cited to no law permitting what was here done, nor have we been able to find it. Appellants have created an extralegal remedy, have then found appellees guilty in some sort of ex parte method, have invoked severe sanctions against them so as to put them out of business, and have afforded them no opportunity to be heard, tried, or correct any faults. This is not a suit to enjoin the enforcement of the law. It is a suit to require enforcement of the law. It is a suit to prohibit self-made, self-tried, and self-executed law. The action here complained against is the excessive use of authority, and equity will intervene when an officer transcends lawful bounds. 28 Am.Jur., Injunctions,§ 239.(continued.....) Magna Charta, June 15, 1215, in its celebrated 39th chapter is translated: "*No free man* shall be arrested or imprisoned, or

> *disseized, or outlawed, or exiled, or in any manner destroyed, nor will we proceed against him, or put burden upon him, except by the legal judgment of his peers, or by the law of the land."*
> *Constantin et al. v. Smith et al., Members of the Railroad Commission of Texas (3 judge district court, opinion by Hutcheson, Circuit Judge) 57 F.2d 227.*

Hoquiam's standardless, arbitrary and selective methods to designate and abate violated petitioner's rights without warrant, or authority of law.

Wyss's protected rights under 1997 Uniform Code for the Abatement of Dangerous Buildings were ignored. The City of Hoquiam and others are subject to 42 U.S.C.A. § 1983 damages claims.

Conclusion:

For the forgoing reasons, and the reasons stated in the Petition, Petitioners respectfully submit that their Petition For A Writ Of Certiorari should be granted.

Dated: November 24, 2004
Respectfully submitted.

JOHN R WYSS,
Petitioner